CHAPTER 9

Constitutional Challenges to the Patient Protection and Affordable Care Act

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Synopsis

§ 9.01 INTRODUCTION

One of the most challenging problems facing the United States today concerns the skyrocketing costs of health care as well as the staggering costs that the nation's uninsured individuals impose on the country's health care system and economy as a whole. National health care spending is projected to grow from $2.5 trillion or 17.6% of the economy, in 2009, to $4.7 trillion in 2019.[1] Unquestionably, the projected growth rate of the nation's health care and health insurance spending over the next decade is unsustainable; health insurance premiums for the average American family have already doubled over the past decade.[2] Furthermore, in 2008, the cost of providing uncompensated health care to the nation's uninsured was estimated to be $43 billion, with the majority of these costs being passed along to consumers by way of health insurance premiums increases averaging $1,000 a year.[3] Addressing these issues has been and continues to be one of the highest priorities for both the legislative and executive branches of the federal government.

President Obama signed the Patient Protection and Affordable Care Act [4] into law on March 23, 2010,[5] which was shortly thereafter amended by the enactment of the Health Care and Education Affordability Reconciliation Act[6] (hereinafter, collectively the "PPACA"). The Health Care and Education Affordability Reconciliation Act served to both revise and delay the effective dates of some of the Patient Protection and Affordable Care Act's provisions.[7] However, the enactment of this legislation may well have served to further politically polarize the nation's citizenry. A poll conducted before the legislation's enactment found that 55% of Americans opposed it being

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(2)(B) (2010).

[2] *The Heritage Foundation*, "Conservative Principles of Health Care Reform: The Road Ahead" 6/15/09.

[3] Patient Protection and Affordable Care Act § 1501(a)(2)(F).

[4] H.R. 3590, Patient Protection and Affordable Care Act (2010).

[5] *New York Times*, "Obama Signs Health Care Overhaul Bill, With a Flourish" 3/23/10.

[6] H.R. 4872, Health Care and Education Affordability Reconciliation Act (2010).

[7] *The Washington Times*, "Obama signs 'fixed' health care bill" 3/30/10.

enacted while 42% approved of it.[8] Moreover, one post-enactment survey found that 60% of Americans favored repealing the legislation while only 36% opposed its repeal.[9] Opponents of the legislation express concerns that it will provide the government with too much control over health care, cause health care costs increase at even greater rates than before its enactment, and cause higher national deficits.[10]

In particular, the PPACA is intended to increase the transparency and efficiency of the country's health insurance markets while substantially decreasing the number of uninsured persons in the country. Nonetheless, it remains to be seen how many uninsured individuals will actually obtain health care coverage as a result of its enactment. Moreover, because the PPACA primarily focuses on increasing access to health care, as opposed to decreasing health care costs, it is uncertain whether its enactment will result in any curtailment of health care and health insurance costs.

Certainly, the PPACA contains a wealth of provisions that serve to regulate the national health care system and health insurance industry. Some of the legislation's key provisions include: a tax penalty assessed against all individuals who fail to obtain minimum essential health coverage; the establishment of state-level health insurance exchanges; insurance premium subsidies for low income individuals and families; incentives (in the form of tax credits) for small businesses to provide health care benefits for employees; the expansion of Medicaid eligibility; and, a prohibition against insurance plans denying coverage and/or claims due to pre-existing conditions.

However, in order fund the expanded access to health care provided by the PPACA, it imposes an assortment of new taxes and fees on individuals, employers, and health care companies alike, including: the assessment of a penalty against larger employers that do not provide affordable health care coverage to their employees; new Medicare taxes levied against high-income tax brackets; and, fees levied against pharmaceutical and medical device companies that, as with most other fees in the commercial setting, will likely be passed-through to consumers.

To be sure, the PPACA's enactment has provoked heated opposition from both state and federal level politicians across the country. In fact, a mere seven minutes after the legislation was enacted, 13 states' attorneys general united to file a lawsuit in a Florida federal district court which directly challenges its constitutionality and requests that their states be exempted from application of its provisions. In addition, immediately following the PPACA's enactment, Virginia's attorney general filed a lawsuit in a

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[8] http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/march_2010/health_care_law. (last visited June 1, 2010).

[9] *Id.*

[10] http://politicalticker.blogs.cnn.com/2010/03/22/cnn-poll-americans-dont-like-health-care-bill/?fbid=jvJGnMduS4R (last visited May 24, 2010).

Virginia federal district court, challenging its constitutionality based on the fact that the state had previously enacted legislation prohibiting the federal government from mandating its citizens to purchase government-approved health insurance.

This article will examine this legislation by first providing a detailed summary of its major provisions in order to facilitate an understanding of the requirements it imposes on the nation's employers, insurers and individuals. Next, it will provide an overview and legal analysis of the claims made in the two federal lawsuits that contend the legislation is unconstitutional. Finally, it will address the changes that employers sponsoring group health plans and cafeteria plans must make—regardless of the outcome of the lawsuits—in order to be compliant with provisions of the PPACA that become effective within the next year.

§ 9.02 MAJOR ELEMENTS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT AND THE HEALTH CARE AND EDUCATION AFFORDABILITY RECONCILIATION ACT

The PPACA, which is designed to provide access to health insurance coverage for most Americans, will impose new responsibilities on employers, individuals and insurers, as well as government programs such as Medicare and Medicaid. Insurers and employers of all sizes will find themselves subjected to new rules, regulations and penalties. Many, if not all, employers will be required to make substantial changes to their group health plans' design and communications. In addition, while most of the provisions of the PPACA will not be effective until 2014, employers necessarily must take immediate steps to reassess their plans with respect to certain provisions that are to become effective in a short period of time. Furthermore, employers must begin to assess their plans to prepare for plan design and administrative changes that will be required in the not too distant future.

[1] PPACA Provisions

The major provisions of the PPACA, as amended, that affect employers either directly or indirectly through their employees or through insurance mandates are as follows:

[a] Mandatory Coverage

Effective in 2014, most US residents will be required to maintain minimum essential health coverage.[11] Generally, the penalty for each individual who does not have this coverage will be the greater of $95 or 1% of income in 2014 and will increase to the greater of $695 or 2.5% of income in 2016.[12] This minimum essential health coverage must contain an "essential health benefits" package and insure at least 60% of the

[11] PPACA § 1501(a).

[12] *Id.* at § 1501(b) (adds Internal Revenue Code ("IRC") § 5000A).

actuarial value of covered services, with annual out-of-pocket limits equal to those that currently apply to high deductible health care plans associated with Health Savings Accounts.[13] (For 2010, this would be $5,950 for an individual and $11,900 for a family.[14]) Essential health benefits include: ambulatory patient services; emergency services; hospitalizations; maternity and newborn care; mental health and substance abuse services; prescription drugs; rehabilitative services and devices; laboratory services; preventative and wellness services; chronic disease management; pediatric services; and other services as defined by the Department of Health and Human Services ("HHS").[15] Furthermore, employer-sponsored plans in the small group market may not impose deductibles that exceed $2,000 for individuals and $4,000 for families.[16]

[b] Employer Group Health Plans

The PPACA makes significant changes that will affect the design and administration of employers' group health plans, whether they are insured or self-funded. Among the most significant provisions:

- Employers with more than 50 employees who do not offer minimum essential health coverage and have at least one employee who receives a federal premium tax credit because of coverage through an "Exchange" (see below) will be assessed a fee of $2,000 per full time employee, with an exception from the penalty for the first 30 employees.[17]
- Also, employers with more than 50 employees will be assessed a penalty of $3,000 for each full time employee who receives a premium tax credit (*see* below), with an exception from the penalty for the first 30 employees.[18]
- Employers with more than 50 employees may not have a group health plan waiting period of more than 90 days.[19]
- Employers with more than 200 employees must automatically enroll their employees in the employer-sponsored group health plan. Em-

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[13] *Id.* at § 1302(a-c).

[14] IRC § 223(c)(2)(A)(ii).

[15] PPACA § 1302(b)(1).

[16] *Id.* at § 1302(c)(2)(A).

[17] *Id.* at § 1513(a) (adds § 4980H to IRC).

[18] *Id.*

[19] *Id.* at § 1201 (adds Public Health Service Act ("PHSA') § 2708).

ployees must be given the opportunity to opt out of coverage.[20]

- Group health plans must provide for preventative care without cost sharing requirements.[21]
- Coverage must be offered to plan participant's children until age 26. The rule initially applies to adult children who are not offered other employer-provided coverage.[22]
- Lifetime and annual limits on coverage would be prohibited, as would pre-existing condition exclusions on children. Certain annual limits and pre-existing condition restrictions for adults are permitted until 2014.[23]
- A group health plan must have "effective" internal and external appeals processes for coverage determinations and claims.[24]
- Insured group health plans will be subject to nondiscrimination rules similar to those currently in effect for self funded plans.[25]
- Employers must offer a "free choice" voucher to an employee to help pay for coverage through an Exchange, if the employee's income is less than 400% of the federal poverty level, and the required employee contribution for the group health plan is between 8% and 9.8% of the employee's income.[26] The value of the voucher must equal the contribution the employer would have made to the group health plan on behalf of the employee.
- The permitted employee incentive for wellness programs is increased from 20% to 30%.[27]

In addition to the design changes, employers will have mandatory notification requirements. Among these, employers will have to include the cost of group health care coverage on the employees' Forms W-2.[28] Employers (or their insurers) must also

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[20] *Id.* at § 1511 (adds Fair Labor Standards Act of 1938 ("FLSA") § 18A).

[21] *Id.* at § 1001 (adds PHSA § 2713).

[22] *Id.* (adds PHSA § 2714).

[23] *Id.* (adds PHSA § 2711).

[24] *Id.* (adds PHSA § 2719).

[25] *Id.* at § 10101(d).

[26] *Id.* at § 10108(a-d).

[27] *Id.* at § 1201 (adds PHSA § 2705).

[28] *Id.* at § 9002 (adds IRC § 6051(a)(14).

provide an information return stating the number of months during which an individual was covered by the employers' plan.[29]

Also, employers must notify employees about the existence of the Exchange and inform them they may be eligible for premium assistance and cost sharing reduction if the employer's contribution to the plan is less than 60% of the total cost of coverage and that if the employee chooses coverage through the Exchange, the employee may lose the employer's coverage contribution.[30] Finally, group health plans will have to comply with HHS standards for the provision of information about benefits and coverage. HHS will provide these standards within 24 months of enactment.[31]

[c] Premium Assistance and Premium Tax Credit

Employers with fewer than 25 employees who have average wages of less than $50,000 will be given a tax credit, starting this year, of up to 35% of the employers' contribution towards health care coverage, if the employer contributes at least 50% of the total premium.[32]

Employees (and other individuals) who are not eligible for essential health benefits will receive advanceable and refundable premium tax credits if their incomes are between 100% and 400% of the federal poverty level.[33] An employee who is offered coverage by his employer will be eligible for the premium tax credit if the employer's group health plan does not pay at least 60% of covered benefit costs or the employee contribution would be more than 9.5% of the employee's income.[34] In addition, the PPACA provides federal cost sharing subsidies to employees and other eligible individuals with incomes below 200% of federal poverty level.[35]

[d] Exchanges

The PPACA creates "American Health Benefit Exchanges" and "Small Business Health Option Program" (SHOP) Exchanges that will allow individuals and small businesses of up to 100 employees to purchase qualified health care coverage.[36] States

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[29] *Id.* at § 1502 (adds IRC § 6055).

[30] *Id.* at § 1512 (adds FLSA §18B).

[31] *Id.* at § 1001 (adds PHSA § 2717).

[32] *Id.* at § 1421(a) (adds IRC § 45R).

[33] *Id.* at § 1401(a) (adds IRC § 36B).

[34] *Id.*

[35] *Id.*

[36] *Id.* at § 1311(b).

may opt to have regional exchanges.[37] The Exchanges are to be operational in 2014.[38]

Four health care coverage benefit categories (Bronze, Silver, Gold and Platinum) will be offered by the Exchanges[39] in addition to a less expensive "Catastrophic Plan" for those under age 31.[40] Other than the Catastrophic Plan, the least expensive Bronze Plan would provide "essential health benefits" and cover 60% of essential benefit costs.[41] Out-of-pocket limits would be reduced for individuals with incomes below 400% of the federal poverty level.[42] The PPACA also creates a Consumer Operated and Oriented Plan (CO-OP) program to help create non-profit member run health insurance organizations.[43]

[e] Health Care Flexible Spending Account Plans, Health Reimbursement Accounts and Health Spending Accounts

Under the PPACA, salary reduction contribution amounts will be limited to $2,500 for Health Care Flexible Spending Account Plans ("FSAs") in 2013.[44] The PPACA eliminates coverage for non-prescription, over-the-counter medications from FSAs and Health Reimbursement Accounts ("HRAs") and makes reimbursements for these items taxable for Health Spending Accounts ("HSAs") in 2011.[45] The excise tax on reimbursements from HSAs for nonqualified medical expenses will increase from 10% to 20% in 2011.[46]

[f] Insurance Market

In addition to the coverage and design requirements listed in the Employer Group Health Plans section (see above), insurers will be required to provide guaranteed issue (i.e., insurance companies cannot bar applicants based on health status) and guaranteed renewability in the group and individual markets.[47] A state or national high-risk pool will be created to provide health insurance coverage to individuals with pre-existing conditions until the Exchanges are established.[48] Insurers' rating variations can only be

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[37] *Id.* at § 1311(f).

[38] *Id.* at § 1311(b).

[39] *Id.* at § 1302(d).

[40] *Id.* at § 1302(e).

[41] *Id.* at § 1302(d).

[42] *Id.* at § 1402.

[43] *Id.* at § 1322(a).

[44] *Id.* at § 9005(a) (adds IRC § 125(i)).

[45] *Id.* at § 9003(a-c).

[46] *Id.* at § 9004(a) (amends IRC § 223(f)(4)(A).

[47] *Id.* at § 1201 (adds PHSA §§ 2702 and 2703).

[48] *Id.* at § 1101.

based on family structure, community rating area, actuarial value of benefits, age (limited to a 3 to 1 ratio) and smoking.[49] HHS will work with the states to review "unreasonable" rate increases, which must be justified to HHS and each state insurance department.[50] States may allow the creation of "health care choice compacts" to permit purchase of individual insurance across state lines.[51]

[g] Medicare and Medicaid

The PPACA reduces certain Medicare payments and establishes an Independent Payment Advisory Board to make recommendations to further reduce the growth of Medicare payments.[52] Medicare Advantage payments will be restructured to be based, in part, on the local market and on performance bonuses.[53] The Medicare Part D prescription drug "donut hole" will be eliminated. Currently, Medicare stops paying after an individual has spent $2,830 on prescription drugs and does not resume payments until out-of-pocket spending reaches $4,550.[54] Coverage will be gradually provided for amounts within the gap until the donut hole is completely eliminated in 2020. [55] Medicaid will be expanded to cover everyone under age 65 having incomes up to 133% of the federal poverty level.[56]

[h] Funding

In addition to taxes imposed on the insurance industry:

- A 40% excise tax is imposed on "Cadillac" health insurance coverage (i.e., a tax on most health plan coverage to the extent the value of the coverage exceeds $10,200 for individuals and $27,500 for family coverage, as indexed by the Consumer Price Index).[57] The excise tax would be effective in 2018.[58]
- The Medicare portion of FICA tax is increased 0.9% in 2013 to 2.35% for taxpayers with joint filings over $250,000 and individual filers with

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[49] *Id.* at § 1201 (adds PHSA § 2701).

[50] *Id.* at § 1003 (adds PHSA § 2794).

[51] *Id.* at § 1333.

[52] *Id.* at § 3403 (adds Social Security Act ("SSA") § 1899A).

[53] *Id.*

[54] http://www.kff.org/medicare/upload/8033.pdf (last visited May 23, 2010).

[55] PPACA § 3315 (adds SSA § 1860D-42(c)).

[56] *Id.* at § 2001 (amends SSA § 1902(a)(10)(A)(i)).

[57] *Id.* at § 9001 (adds IRC § 4980I).

[58] *Id.*

income over $200,000.[59]

- A 3.8% surtax is imposed in 2013 on net investment income (subject to limits) for taxpayers with joint filings over $250,000, or $200,000 in the case of those filing individual returns.[60]
- The PPACA reduces Medicare Part D premium subsidies in 2011 for joint filers with incomes over $170,000 and individual filers with incomes over $85,000.[61]
- Federal subsidies are paid to employers who maintain retiree drug coverage after the implementation of Medicare Part D.[62] The PPACA eliminates the deduction for expenses attributable to the Medicare Part D subsidy.[63]
- The PPACA increases the threshold on personal deductions for unreimbursed medical expenses from 7.5% to 10% of adjusted gross income beginning in 2013.[64]
- A 10% excise tax is imposed on indoor tanning services.[65]

§ 9.03 ANALYSIS OF THE CONSTITUTIONALITY OF THE PATIENT PROTECTION AND AFFORDBLE CARE ACT

Shortly after President Barack Obama signed the Patient Protection and Affordable Care Act into law, attorneys general from fourteen states filed lawsuits in federal district courts directly challenging its constitutionality.[66] In fact, two separate and distinct complaints filed by these attorneys general are currently pending in Florida and Virginia federal district courts.[67]

[1] The Florida Lawsuit

In Florida, thirteen states' attorneys general—twelve of whom are Republican—led by Florida attorney general Bill McCollum, filed a lawsuit in U.S. District Court in

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[59] *Id.* at § 9015.

[60] *Id.* at § 1402(a) (adds IRC Chapter 2A).

[61] *Id.* at § 3308 (amends SSA 1860D-13(a)).

[62] http://www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=14861 (last visited May 23, 2010).

[63] PPACA § 9012 (amends IRC § 139A).

[64] *Id.* at § 9013 (amends IRC § 213(a)).

[65] *Id.* at § 10907 (adds IRC Subchapter D Chapter 49 § 5000B).

[66] *The Boston Globe*, "13 attorneys general sue on health care bill" 3/24/10.

[67] *The Christian Science Monitor*, "Attorneys general in 14 states sue to block healthcare reform law" 3/23/10.

Pensacola, only seven minutes after President Barack Obama signed the Patient Protection and Affordable Care Act into law.[68] The states whose attorneys general originally joined McCollum in this lawsuit include: Alabama, Colorado, Idaho, Louisiana, Michigan, Nebraska, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington.[69] Subsequently, several more states have joined in the Florida lawsuit, including: Alaska, Arizona, Georgia, Indiana, Mississippi, Nevada, and, North Dakota.[70]

Under PPACA § 1501, by 2014, all United States citizens and lawfully residing aliens must either obtain minimum essential health care coverage or face assessment of a penalty of up to 2.5 percent of their income.[71] The Florida complaint's primary contention is that the PPACA cannot be upheld as constitutional because the individual mandate found in § 1501 exceeds Congress's ability to regulate interstate commerce by use of its Commerce Clause power. The attorneys general claim that an individual's failure to obtain insurance is not a commercial activity, nor is purchasing insurance an activity which must be controlled in order to regulate the health care industry. In particular, Florida attorney general Bill McCollum avers that "[T]he Constitution nowhere authorizes the United States to mandate, either directly or under threat of penalty, that all citizens and legal residents of the United States have qualifying healthcare coverage. Such a mandate . . . exceeds the powers of the United States under Article I of the Constitution."[72]

In addition, the Florida complaint asserts that the PPACA forces states to create health insurance exchanges and expand Medicaid eligibility beyond its current parameters (and coincidently will force the states to bear significant costs in doing so) and thereby "runs afoul of the Constitution's principle of federalism, by commandeering the [states] and their employees" in violation of the Tenth Amendment.[73]

Finally, the Florida complaint contends that the PPACA's § 1501 individual mandate penalty embodies a direct tax that is not apportioned among the states according to census data and thereby directly violates of Article I, §§ 2 and 9 of the United States Constitution.[74]

[2] The Virginia Lawsuit

On March 23, 2010, Virginia's Attorney General Kenneth Cuccinelli filed a lawsuit

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[68] *Id.*

[69] Case 3:10-cv-00091-RV-EMT, Page 1 3/23/10.

[70] http://www.healthcarelawsuit.us/ (last visited May 18, 2010).

[71] PPACA § 1501 (adds IRC § 5000A).

[72] Case 3:10-cv-00091-RV-EMT, Page 4, 3/23/10.

[73] *Id.* at 16.

[74] *Id.* at 17.

in U.S. District Court in Richmond which also challenges the constitutionality of the PPACA and, similar to the Florida lawsuit, contends that the legislation exceeds Congress's Commerce clause power.[75] Specifically, in Count One of the complaint, Cuccinelli explains that it has "never been held that the Commerce Clause . . . can be used to require citizens to buy goods or services."[76]

However, the Virginia complaint contains a unique aspect not found in the Florida complaint. On March 5, 2010, the Virginia assembly enacted the Virginia Healthcare Freedom Act (the "VHFA") which declares that no citizen of the Commonwealth of Virginia can be compelled to carry health insurance, nor can they be forced to pay a fine or penalty for refusing to obtain such coverage.[77] One consequence of the enactment of this law is that it may provide a necessary element for the Virginia federal court to hear the case. Cuccinelli will likely contend that Virginia's interest in vindicating the VHFA immediately creates a justiciable controversy—an element that must be present in any lawsuit for a court to exercise its judicial authority[78]—despite the fact that the individual mandate found in § 1501 of the PPACA does not go into effect until 2014.

[3] Analysis of Lawsuits Challenging the Constitutionality of the PPACA

This section will first examine the two exclusive claims made in the Florida complaint that challenge the constitutionality of certain provisions of the PPACA. In particular, it will first analyze Count One of the Florida complaint's allegation that the PPACA represents an unconstitutional exercise of federal power in violation of the Tenth Amendment. Next, it will examine Count Two of the Florida complaint's claim that the individual mandate found in § 1501 of the PPACA is a violation of the constitutional prohibition against unapportioned direct taxes. Finally, because the Florida and Virginia complaints both directly challenge Congress's authority to enact the PPACA using its Commerce Clause power, it will analyze: what the Commerce Clause is; recent cases decided by the United States Supreme Court concerning the parameters by which Congress may use its Commerce Clause power; and, whether Congress acted within the established boundaries of its Commerce Clause power in enacting the PPACA. Although beyond the scope of this article, it is worth noting that subsequent lawsuits may be filed by the federal government claiming preemption against enacted state and local legislation that serve to establish similar forms of health

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[75] Case 3:10-cv-00188-HEH, Page 5 3/23/10.

[76] *Id.*

[77] Virginia Healthcare Freedom Act (VA Code § 3.82-302.1).

[78] May, Christopher N.; Ides, Allan *Constitutional Law: National Power and Federalism* 97–99 (4th ed. Aspen Publishers) (2007).

care coverage mandates.[79]

[a] Analysis of the Claim that the PPACA Violates the Tenth Amendment

Count One of the Florida complaint alleges that the PPACA is an unconstitutional exercise of federal power in violation of the Tenth Amendment. Particularly, Count One declares that the PPACA "violates the Tenth Amendment of the Constitution . . . by commandeering the [states] and their employees as agents of the federal government's regulatory scheme at the states' own cost."[80]

Specifically, the Tenth Amendment of the Constitution provides that "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This declaration,

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[79] The Supremacy Clause of Article IV of the United States Constitution states that, where state and federal laws conflict, state law must yield to federal law. In fact, when Congress enacts statutes, it sometimes states explicitly that the statute is intended to preempt a certain area of state or local law. An example of this can be found in the Employee Retirement Income Security Act of 1974 ("ERISA") which expressly states that it "supersede[s] any and all State laws insofar as they . . . relate to any employee benefit plan [.]"(29 U.S.C. § 1144(a)). As a result of this provision, it appears that any state or local law that attempts to regulate some aspect of an employee benefit plan would violate the Supremacy Clause even though such regulation may operate in harmony with ERISA. In response to this concern, the Department of Labor announced that it is issuing proposed regulations clarifying when "health care reform efforts on the part of state and local governments result in the creation of ERISA-covered employee welfare benefit plans or otherwise implicate ERISA." For example, under the Massachusetts Health Care Reform Act, most Massachusetts employers must adopt and maintain a premium conversion plan that allows most employees to pay their share of health care premiums with pre-tax dollars. Employees who are eligible for the employer's group health plan can make their contributions to the employer's plan while other employees, generally, may purchase their own insurance through the Commonwealth Connector. The current Massachusetts requirements raise the question of whether an employer's involvement in its employees' purchase of coverage through the Connector (that is, the employer's required establishment of a premium conversion plan that permits pre-tax premium payments) would be sufficient involvement by the employer to establish that the employer has created an ERISA-covered plan for these individuals. (Note: A premium conversion plan, by itself, is not an ERISA-covered plan.) ERISA coverage questions may also arise with respect to the Connector's recently established Business Express Program for employers with 50 or fewer employees. Also, certain "pay-or-play" laws (where an employer must establish a health plan or pay a penalty) would be affected by a new definition for ERISA-covered welfare plans. In a case that may be reviewed by the U.S. Supreme Court, the U.S. Court of Appeals for the Ninth Circuit upheld a San Francisco ordinance requiring employers with 20 or more employees to either spend at least $1.17 to $1.76 per hour (depending on the employer's size) on health care for their own employees or make a comparable payment to the city. The Court of Appeals ruled that the ordinance is not preempted by ERISA, because the ordinance allows employers to have a choice between making the payments and keeping their own ERISA-covered plans. The new regulations could help establish whether laws such as this can be preempted by ERISA because they "relate to" employers' employee benefit plans.

[80] Case 3:10-cv-00091-RV-EMT, Page 4, 3/23/10.

clarifying the concept that the federal government is limited only to the powers granted by the Constitution, is recognized by many legal scholars to be rhetorical, in that this assertion is so obvious that it is hardly noteworthy.[81]

Nonetheless, in *Printz v. U.S.*,[82] the Supreme Court held that, under the Tenth Amendment, the federal government cannot compel a state or local government's executive branch to perform functions—even if these functions are purely ministerial and simple to perform.[83] In *Printz*, the Court was asked to determine the constitutionality of a provision found in the Brady Handgun Violence Prevention Act[84] that mandated local law enforcement officials to conduct background checks on prospective handgun purchasers, until a national system for doing these checks could be created. Mr. Printz, a local sheriff in Montana, opposed such a background check requirement and filed suit against the federal government contending that, pursuant to the Tenth Amendment, the federal government could not compel him to conduct such background checks.

The Supreme Court agreed with Mr. Printz and held that the federal government "may not compel the States to enact or administer a federal regulatory program."[85] The Supreme Court reasoned that the background check portion of the Brady Handgun Violence Prevention Act offended the Tenth Amendment's concept of federalism, stating that "[I]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority . . . [I]t is no more compatible with this independence and autonomy The Supreme Court agreed with Mr. Printz and held that the federal government "may not compel the States to enact or administer a federal regulatory program." The Supreme Court reasoned that the background check portion of the Brady Handgun Violence Prevention Act offended the Tenth Amendment's concept of federalism, stating that "[I]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority . . . [I]t is no more compatible with this independence and autonomy that their officers be 'dragooned' . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be pressed into service for the execution of state laws."[86]

As with the plaintiff in the *Printz* case, Count One of the Florida complaint alleges

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[81] *United States v. Sprague*, 282 U.S. 716, 733 (1931), where the Supreme Court stated that the Tenth Amendment "added nothing to the [Constitution] as originally ratified."

[82] 521 U.S. 898 (1997).

[83] *Id.* at 929.

[84] 18 U.S.C. § 921

[85] *Printz*, 521 U.S. at 933.

[86] *Id.* at 928.

that the PPACA amounts to an unprecedented encroachment on the sovereignty of the states in direct violation of the Tenth Amendment of the Constitution.[87] To support this allegation, Count One alleges that the PPACA forces the states to expand Medicaid eligibility, which will necessarily require the expansion of their Medicaid programs and, in turn, impose significant costs and administrative burdens upon the states.[88] Further, the Florida complaint cites additional burdens being foisted upon the states by the PPACA, such as the set-up and operation of state-run insurance exchanges, along with regulatory commissions and consumer protection agencies required to oversee and monitor such exchanges.[89]

Nonetheless, unlike the statute at issue in *Printz*, the PPACA does not compel the states to do anything. Under the PPACA, no state is *required* to set up any insurance exchange; if states fail establish an exchange, the federal government will establish one for residents of that state. Neither is any state *required* to participate in the Medicaid program, a voluntary joint venture between the federal government and the states in which the federal government pays for over half of the costs associated with this program.[90] To be sure, as the Florida complaint contends, it would be quite impractical, if not impossible, for a state to withdraw its participation in the Medicaid program, a program which provides their poorest citizens with health care they would otherwise be unable to obtain. Despite this fact, there is an abundance of case law supporting the notion that Congress can attach conditions to the funding it provides to the states.[91] Furthermore, Congress has always imposed requirements on Medicaid programs which the states are obligated to meet in order to receive federal funding.[92]

Consequently, when the federal court hearing the Florida complaint analyzes the facts surrounding the states' assertion that the PPACA is unconstitutionally "commandeering [the states'] employees" to expand Medicaid and set up and administer state-run health insurance exchanges, it appears to have no choice but to dismiss this claim.

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[87] Case 3:10-cv-00091-RV-EMT, Page 16, 3/23/10.

[88] *Id.*

[89] *Id.*

[90] *Equal Access for El Paso v. Hawkins*, 562 F.3d 724, 726 (5th Cir. 2009).

[91] *See South Dakota v. Dole*, 483 U.S. 203 (1987). The Supreme Court upheld as constitutionally sound Congress's National Minimum Drinking Age Act which, in operation, withheld 5% of Federal Highway Aid Act funds from states that did not adopt a minimum legal age of 21 for the purchase and possession of alcohol. See also *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 133 (1947) where the Supreme Court held that the Federal Government possessed the "power to fix the terms upon which its money allotments to states shall be disbursed."

[92] *Hawkins*, at 726 (2009).

[b] Analysis of the Claim that the Individual Mandate Penalty Constitutes an Unapportioned Direct Tax

Count Two of the Florida complaint asserts that the penalty assessed under PPACA § 1501 against individuals who fail to obtain minimum essential healthcare coverage is an unconstitutional direct tax because it is not, and cannot be, apportioned among the states[93] as required by the United States Constitution.[94] Count Two contends that the penalty is a direct tax since it is levied against individuals for no other reason than their residence in the United States.[95]

In distinguishing between direct and indirect taxes, the Supreme Court has stated that direct taxes are taxes attributable to ownership of property, including income generated from such ownership,[96] as well as capitation taxes[97] (e.g., a "poll tax").[98] Following this guidance, in *Murphy v. Internal Revenue Service and United States*, the United States Court of Appeals for the District of Columbia stated that "[O]nly three taxes are definitely known to be direct: (1) a capitation [tax] . . . , (2) a tax upon real property, and (3) a tax on personal property."[99] By contrast, the Supreme Court has stated that indirect taxes are typically "levied on the 'occasion of a particular isolated act."[100] Logically, it follows that indirect taxes can be avoided; individuals can choose to avoid engaging in activities that are subject to indirect taxes. Thus, indirect taxes are "voluntary" taxes.

When Congress levies a direct tax, it must be apportioned among the states according to each state's population.[101] Alternatively, when Congress levies an

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[93] Case 3:10-cv-00091-RV-EMT, page 17.

[94] The U.S. Constitution provides that "[N]o capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." U.S. Const. art. I, § 9, cl. 4. For example, if State X has twice as many citizens as State Y, the amount of revenue collected—in relation to a direct tax imposed by the federal government—from State X must be twice that collected from State Y.

[95] Case 3:10-cv-00091-RV-EMT, page 17.

[96] See *Bromley v. McCaughn*, 280 U.S. 124, 136 (1924).

[97] "Any tax when placed on the right of the man . . . to live is a capitation tax and as direct as any tax can be." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 119 (1910).

[98] A "poll tax" is defined as a capitation tax; a tax of a specific sum levied upon each person within the jurisdiction of the taxing power, and within a certain class (as, all males of a certain age, etc.) without reference to his property or lack of it." *Blacks Law Dictionary*, p. 1034 (5th ed. 1979).

[99] *Murphy v. Internal Revenue Service and United States*, case no. 05-5139, page 20 (D.C. Cir. 2007).

[100] See *Knowlton v. Moore*, 178 U.S. 41, 47 (1900).

[101] "[N]o capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." U.S. Const. art. I, § 9, cl. 4. For example, if State X has twice as many citizens as State Y, the amount of revenue collected—in relation to a direct tax imposed by the federal

indirect tax, it need only be "uniform."[102] In fact, the Constitution specifically grants Congress the power to levy indirect taxes including duties, imposts, and excise taxes.[103] Currently, the federal government levies excise taxes on a variety of activities in which individuals voluntarily engage, such as: purchasing alcohol,[104] tobacco,[105] and gasoline;[106] using cellular telephones;[107] and, traveling via airline.[108] The federal government also levies excise taxes on entities that choose to engage in certain activities. For example, federal excise taxes are levied against nonprofit organizations that engage in political lobbying[109] and qualified employee benefit plans that engage in prohibited transactions with certain disqualified persons.[110]

One case in particular decided by the Supreme Court demonstrates the connection between voluntary activity and indirect taxes. In *Knowlton v. Moore*, the Supreme Court was asked to decide whether the recently enacted federal estate tax was a direct tax requiring apportionment among the states, based on population, or an indirect tax that only required its application to be uniform.[111] The Supreme Court held that the estate tax was, in operation, an indirect tax, reasoning that it was not a tax levied against real or personal property.[112] Rather, the Supreme Court found that the estate tax was an indirect excise tax because it functioned as a tax on an individual's voluntary activity—the transfer of the individual's wealth to his or her heirs upon death.[113]

In the present case, the penalty assessed against individuals who fail to obtain minimum essential healthcare coverage, as required under § 1501 of the PPACA, is also likely to be found an indirect tax not requiring apportionment among the states. The § 1501 penalty should not be classified as a direct tax because it does not tax real

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government—from State X must be twice that collected from State Y.

[102] "[T]he Congress shall have power [T]o lay and collect Taxes, Duties, Imposts and Excises [. . .] but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1.

[103] *Id.*

[104] 26 U.S.C. Chapter 51-Distilled Spirits, Wines, and Beer.

[105] 26 U.S.C. Chapter 52–Tobacco Products and Cigarette Papers and Tubes.

[106] 26 U.S.C. § 4081.

[107] 26 U.S.C. § 4251.

[108] 26 U.S.C. § 4261.

[109] I.R.C. § 4911.

[110] I.R.C. § 4975.

[111] *Knowlton v. Moore,* 178 U.S. 41, 44–45 (1900).

[112] *See Id.* at 55–56.

[113] *See Id.*

or personal property, nor is it a capitation tax levied against each person within the United States without reference to their property, or lack thereof.

In fact, the § 1501 penalty is only levied against certain individuals who fail to obtain minimum essential healthcare coverage. Moreover, the amount of the penalty assessed against such individuals under PPACA § 1501 is determined by their gross income during the preceding year, and, as such, takes into consideration the individual's property when levying the penalty.[114] Therefore, the § 1501 penalty cannot be categorized as a capitation tax.

Given the federal government's prior activities and the Supreme Court's decision in *Knowlton*, the allegations made in Count Two of the Florida complaint are unlikely to prevail. The § 1501 penalty is not assessed against individuals simply because they reside in the United States. Instead, as with the inheritance tax at issue in *Knowlton* and the above-stated examples of excise taxes currently levied by the federal government, the PPACA's individual coverage mandate levies a tax on an individual's voluntary activity—the decision to self-insure against illness or injury by declining to obtain minimum essential healthcare coverage. Accordingly, this penalty should likewise be categorized as an excise tax that does not require apportionment among the states.

Moreover, § 1501 of the PPACA added § 5000A of the Internal Revenue Code, which provides the penalties for failure to obtain the required healthcare coverage. Congress appropriately placed § 5000A under Subtitle D of the Code, which is entitled "Miscellaneous Excise Taxes."[115] The decision to place this penalty provision in Subtitle D of the Code clearly demonstrates congressional intent for this penalty to operate as an indirect excise tax, and not a direct tax. Consequently, when determining whether this penalty is a direct tax requiring apportionment among the states according to population, the federal court should have little difficulty concluding, based on both form and substance, that the § 1501 penalty is an excise tax that need only be uniform in its application.

Aside from the fact that the § 1501 penalty will likely be found to be an indirect excise tax, Count Two of the Florida complaint has an even more fatal flaw—Florida, and the other states, lack the standing to pursue their claim in federal court. For well over a century now, the Supreme Court has acknowledged that states lack standing to file lawsuits attempting to protect their citizens from alleged unconstitutional federal tax laws.[116]

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[114] PPACA § 1501(c).

[115] *Id.* § 1501(a)(2)(H).

[116] *Massachusetts v. Mellon*, 262 U.S. 447, 485–486 (1927). In arriving at this conclusion, the Supreme Court stated "it is the United States, and not the state, which represents them as parens patriae when such representation becomes appropriate."

In *Florida v. Mellon*,[117] the Supreme Court was asked by the state of Florida to declare as unconstitutional a recently enacted provision[118] of the Internal Revenue Code relating to the federal estate tax. Under § 301 of the Revenue Act of 1926—a provision which served to lower federal estate taxes—individuals who paid estate taxes under state law were able to apply up to 80% of such a payment to a state, as a credit towards the amount of federal estate tax owed. In its suit, Florida claimed that § 301 of the Revenue Act of 1926, when applied to citizens of Florida, was unconstitutional because Florida, according to its state constitution, was prohibited from enacting a state-level estate tax.[119] Specifically, the state of Florida argued that its inability to enact a state-level estate tax would cause millions of dollars of property, which would otherwise remain subject to Florida state taxes, to leave the state annually.[120] Florida reasoned that this would result in a diminution of tax revenue it collected, requiring it to increase or impose other taxes on its citizenry to make up the consequential deficit. Florida further claimed that § 301 caused the federal estate tax to be imposed in a non-uniform manner, thereby violating the Constitution.[121]

Upon reviewing Florida's claim, the Supreme Court held that a state cannot, as *parens patriae*, represent their citizens in a lawsuit to protect them from unconstitutional inequalities alleged to result from a federal tax law.[122] The Supreme Court reasoned that, because state citizens are also citizens of the United States, "it is the United States, and not the state, which represents them as *parens partriae* when such representation becomes appropriate, and to the former, and not the latter, they must look for protective measures as flows from that status."[123]

Additionally, the Supreme Court found that the state of Florida itself had not sustained, nor was immediately in danger of sustaining, any direct injury from enforcement of the legislation.[124] The Supreme Court reasoned that Florida had the opportunity to impose other taxes that would make up for any revenue deficiency resulting from the application of the tax provision at issue. As a result, the Supreme Court dismissed the complaint concluding that Florida lacked the standing needed to

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[117] 273 U.S. 12 (1927).

[118] The Revenue Act of 1926.

[119] *Florida v. Mellon,* 273 U.S. at 15. At the time, the Florida constitution stated that no tax on inheritances could be levied by the state or under its authority. Florida was one of three states (including Alabama and Nevada) in the nation that did not have a state-level estate tax.

[120] *Id.*

[121] *Id.* at 16.

[122] *Id.* at 18.

[123] *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923)).

[124] *Id.*

pursue such a claim.[125]

As in *Mellon*, the attorneys general in the current case cannot file a lawsuit to protect their states' citizens from unconstitutional inequalities alleged to occur from application of the penalty found in § 1501 of the PPACA. Furthermore, they cannot successfully argue that their states are immediately in danger of sustaining a direct injury from the enforcement of the § 1501 penalty since the § 1501 penalty does not take effect until 2014.[126] Therefore, the federal court hearing the Florida complaint will likely dismiss Count Two due to the lack of standing required for the court to decide the merits of this claim.

[c] Analysis of the Commerce Clause Challenge

[i] What is the Commerce Clause?

Both the Florida and Virginia complaints argue that the PPACA is an unconstitutional act by Congress because it exceeds their enumerated powers under the Constitution. In particular, both complaints allege that the PPACA does not regulate activity that affects interstate commerce. Instead, they contend that the PPACA regulates inactivity—an individual's failure to obtain minimum essential healthcare coverage—and consequently prevents Congress from using its Commerce Clause power to create such legislation.

Article I, § 8 clause 3 of the United States Constitution—commonly referred to as the Commerce Clause—provides Congress with the power "[T]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[127] Congress's power to regulate commerce among the states is of great importance, as it is through this specific grant of power that most congressional actions over the past century have been jurisdictionally based.[128] In fact, most federal criminal statutes along with much of the federal legislation concerning civil rights[129] and environmental protection[130] came in to being through Congress exercising its Commerce Clause power.

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[125] *Id.*

[126] PPACA § 1501(b) (adds § 5000A to I.R.C.) states "[A]n applicable individual shall for each month beginning *after* 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."

[127] U.S. Const., Art. I, § 8, cl. 3. It is important to mention that the Commerce Clause is enhanced by the Necessary and Proper Clause that allows Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . " U.S. Const., Art. I, § 8, cl. 18.

[128] *CRS Report for Congress*, "Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis" 7/24/2009, page 3.

[129] Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241).

[130] Endangered Species Act of 1973 (16 U.S.C. § 1531).

Moreover, the Commerce Clause serves as a limitation on the states' power to legislate. In *Gibbons v. Ogden*,[131] Chief Justice Marshall made it clear that no area of interstate commerce is reserved for state control or regulation. Specifically, Marshall stated that, regarding the scope of the power of the Commerce Clause, "[T]his power, like all others vested in Congress, is complete in itself, may be exercised to the utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[132]

That being said, Congress's power under the Commerce Clause is certainly not without boundaries. Both Congress and the Supreme Court have grappled to define the limits on Congress's power to enact legislation under the Commerce Clause since Congress began exercising such power. In *NLRB v. Jones & Laughlin Steel Corp.*,[133] the Supreme Court opined: "[T]he authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."[134]

Conceding the well established, broad base for congressional action provided under the Commerce Clause, it is still questionable whether Congress may use this power to compel all United States citizens and legal residents to obtain minimum essential health care coverage or face a monetary penalty. Never before in its history has Congress used its Commerce Clause power to order individuals to purchase a good or service that may have a substantial effect on interstate commerce.

In fact, Congress apparently questioned whether it had the power to make such a mandate when, in July 2009, it requested that the Congressional Research Service ("CRS") analyze whether it could enact an individual health insurance coverage requirement that would pass constitutional muster.[135] In its response, CRS opined "[T]his is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or service and whether this type of required participation can be considered economic activity."[136]

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[131] *Gibbons v. Ogden*, 22 U.S. 1, 197–98 (1824).

[132] *Id.* at 197. With this statement, Chief Justice Marshall implicitly rejected the notion suggested by the plaintiff Ogden that the Tenth Amendment served as a limit on Congress' ability to regulate interstate commerce.

[133] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

[134] *Id.* at 30.

[135] The Heritage Foundation, "Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional" 12/9/09.

[136] *CRS Report for Congress*, "Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis" 7/24/2009 page 6.

[ii] Commerce Clause Jurisprudence

In order to resolve the question of whether Congress validly exercised its Commerce Clause power in enacting the PPACA individual mandate, it is necessary to review the jurisprudence that served to establish the current parameters for Congress's use of the Commerce Clause when enacting legislation under its authority. When the federal courts review the merits of the sections of the complaints filed in Florida and Virginia that challenge the constitutionality of the individual mandate, they will most certainly look to the Supreme Court's prior decisions which serve to delineate the boundaries on when and how Congress may use its Commerce Clause power.

Over the better part of the past century, the Supreme Court has recognized three specific categories of activity that Congress can regulate through its use of the Commerce Clause power. First, Congress can regulate the use of "the channels of interstate commerce," such as regulating the railroads, highways, and aircraft transportation in order to prevent their misuse.[137] Second, the Commerce Clause allows Congress to protect "instrumentalities in interstate commerce," such as enacting federal legislation prohibiting the destruction of aircraft or pilferage of interstate shipments.[138] Finally, Congress may use its Commerce Clause power to regulate activities having a "substantial relationship and affect" on interstate commerce.[139]

Without question, the congressional mandate requiring individuals to purchase minimum essential health care coverage does not involve the regulation of a channel or instrumentality of interstate commerce. Therefore, the federal courts determining whether Congress possesses the authority to make such a mandate will necessarily focus on the third and final Commerce Clause category: activities that "substantially affect" interstate commerce. As a matter of fact, in the PPACA itself, Congress states the following rationale for this mandate: "[T]he individual responsibility requirement . . . is commercial and economic in nature, and substantially affects interstate commerce . . . [and] regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased."[140]

In the past, the Supreme Court has stated that "where the class of activities is regulated and that class is within reach of the federal power, the courts have no powers 'to excise, as trivial, individual instances' of the class."[141] Consequently, opponents of the mandate seeking to challenge its constitutionality will be unsuccessful in trying to

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[137] *Perez v. United States*, 402 U.S. 146, 150 (1971).

[138] *Id.*

[139] *United States v. Lopez*, 514 U.S. 549, 559 (1995).

[140] PPACA § 1501(a)(1)-(2)(A).

[141] *Perez*, 402 U.S. at 154.

argue that their decision to not purchase health insurance would have such a minimal, if any, impact on interstate commerce that the mandate cannot be applied to them constitutionally.

After careful review of § 1501 of the PPACA—the provision mandating individual health insurance coverage—one can only determine that such a mandate does not regulate traditional economic activity of any kind, but rather "economic inactivity." As a result, the federal courts, when determining the constitutionality of the individual mandate, will first need to decide whether an individual's choice to not obtain health care coverage is an activity that falls within a class of activities substantially affecting interstate commerce.

To be sure, no decision by the Supreme Court has upheld Congress's ability to use the Commerce Clause to compel an individual, who has otherwise done nothing, to engage in economic activity. Some proponents of healthcare reform may cite the famous case *Heart of Atlanta Motel v. US,*[142] where the Supreme Court determined that Congress possessed the power to compel hotels and restaurants to provide services to African Americans. However, in *Heart of Atlanta*, all of the persons or entities being regulated made an affirmative choice to participate in commerce by operating a retail establishment (e.g., a hotel or restaurant). Concerning the PPACA's requirement for all individuals to purchase minimum essential healthcare coverage, there has been no similar choice made by individuals to affirmatively engage in economic activity. Consequently, the federal courts will be required make a novel determination as to whether Congress may compel individuals to buy a service or good by way of its Commerce Clause power. In the process of doing so, the federal courts will essentially review recent cases decided by the Supreme Court that serve to define Congress's ability to regulate activity that "substantially affects" interstate commerce.

[iii] Recent Cases Decided by the Supreme Court that are Relevant to the Commerce Clause's "Substantially Affects" Category

In order to understand the substance of what the Supreme Court means by activities having a "substantial affect" on interstate commerce, it is necessary to review certain cases where it has expounded on this concept. Various recent cases including *United States v. Lopez,*[143] *United States v. Morrison,*[144] and *Gonzales v. Raich,*[145] along with several earlier cases, such as *NLRB v. Jones & Laughlin Steel Corp.*[146] and *Wickard*

[142] 379 U.S. 241 (1964).

[143] 514 U.S. 549 (1995).

[144] 529 U.S. 598 (2000).

[145] 545 U.S. 1 (2005).

[146] 301 U.S. 1 (1937).

v. Filburn,[147] serve to elucidate the Supreme Court's process of analysis under this "substantially affects" category.

Certainly, in the aggregate, these cases demonstrate the Supreme Court's willingness to defer to Congress's decisions to regulate commerce so long as there is supporting evidence that Congress had a rational basis to conclude that the activity in question "substantially affects" interstate commerce. However, that being said, the Supreme Court has shown no hesitation in striking down legislation as unconstitutional when it believes the nexus between the activity Congress is regulating and its impact on interstate commerce is too attenuated.[148]

Prior to 1937, when reviewing the constitutionality of federal legislation enacted under the Commerce Clause power, the Supreme Court had unwaveringly required a direct and logical relationship between the interstate activity being regulated and interstate commerce, regardless of whether the Supreme Court believed Congress had a rational basis to believe so.[149] This narrow view of Congress's Commerce Clause powers lasted until 1937 and served to obstruct President Franklin Delano Roosevelt's attempts to enact federal legislation he believed would serve to place the national economy back on track after the Great Depression.

However, in 1937, immediately following his landslide reelection victory, Roosevelt proposed to "pack" the Supreme Court; that is, to add one new justice for each justice over 70, based on Roosevelt's stated belief that the nine justices currently serving were "overworked."[150] In response to this threat, the Supreme Court made a noticeable shift in its judicial philosophy, and in its subsequent decisions, expanded the scope of the federal government's use of the Commerce Clause.

[A] *NLRB v. Jones & Laughlin Steel Corp.*

The Supreme Court, when deciding *NLRB v. Jones & Laughlin Steel Corp*, [151] departed from its previous rigidity and expanded Congress's ability to use the Commerce Clause to regulate activity. Specifically, the Supreme Court now demonstrated a great willingness to defer to the federal government's legislative decisions by loosening the nexus required between the activity being regulated and interstate commerce.

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[147] 317 U.S. 111 (1942).

[148] *Lopez*, 514 U.S. at 567, where the court, in analyzing whether Congress's determination that possessing a gun in a school zone has a substantial effect on interstate commerce states "[A]dmittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action . . . but we decline here to proceed any further."

[149] See *Carter v. Carter Coal Co.*, 298 U.S. 238, 307-308 (1936).

[150] It is important to note that there is no provision in the United States Constitution specifying the number of justices the Supreme Court must have.

[151] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

The *Jones & Laughlin Steel Corp.*case involved a challenge over the National Labor Relations Act of 1935 (the "NLRA"), which Congress enacted after determining that labor-management disputes were directly related to the flow of interstate commerce and, thus, could be regulated by the national government.[152] The National Labor Relations Board (the "NLRB"), the federal entity tasked with enforcing the NLRA, accused Jones & Laughlin Steel Corp. of discriminating against employees who were union members. In particular, the NLRB asserted that Jones and Laughlin terminated any employee who engaged in union activity. The NLRB, in turn, filed suit against Jones & Laughlin Steel Corp., attempting to enjoin such behavior, because it feared it would lead to work stoppages.[153]

In attempting to avoid liability under the NLRA, Jones & Laughlin Steel Corp. argued that the NLRA was not applicable to them because they were not involved in interstate commerce, as they only manufactured iron and steel in Pennsylvania—a purely intrastate activity. However, the Supreme Court held that Congress may enact legislation regulating activity, whether it is interstate or intrastate, so long as the activity being regulated substantially affects interstate commerce.[154] The Supreme Court noted that, even if Jones & Laughlin Steel Corp. were producing steel in Pennsylvania alone, they owned mines in several other states, operated vessels on the Great Lakes, and sent upwards of 75% of their product outside of Pennsylvania.[155] The Supreme Court concluded that a work stoppage at the Pennsylvania plant would have a substantial effect on interstate commerce and, as a result, Congress could constitutionally regulate labor relations at such a plant.[156]

[B] *Wickard v. Filburn*

A second expansion of the federal government's Commerce Clause power occurred shortly after the Supreme Court's *Jones & Laughlin Steel Corp.* decision. In *Wickard v. Filburn*, the Supreme Court crafted what has come to be known as the "cumulative effect" theory. The "cumulative effect" theory embraces the notion that Congress may regulate not only acts that, taken alone, have substantial economic effects, but also an entire class of acts—even when one act within the class has a negligible impact on interstate commerce—if the class has a substantial economic effect on interstate commerce.

In *Wickard*, the Supreme Court was asked to determine whether the Commerce Clause allowed the Secretary of Agriculture to amend the Agricultural Adjustment Act

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[152] *See Id.* at 22-24.

[153] *Id.*

[154] *Id.* at 40.

[155] *Id.* at 27.

[156] *Id.*This health insurance adverse selection principle

of 1938 (AAA) so as to allow it to regulate the growth of wheat on farms that had no intention of putting such wheat into interstate or intrastate commerce. Under the AAA, the Secretary of Agriculture was permitted to set quotas for the raising of wheat on every farm in the country. However, the AAA wheat quotas, when amended by the Secretary of Agriculture, were applied not only to farms that grew wheat intending that such wheat would be placed into interstate and intrastate commerce, but also to farms that grew wheat for purely their own personal use.[157]

The Supreme Court, in determining the AAA to be constitutional, held that activities, regardless of their economic or non-economic nature, may be regulated by Congress: 1) if such activities cumulatively have a "substantial economic effect on interstate commerce;"[158] and, 2) that if such activities are left outside the scope of Congress's regulation, they would serve to defeat or obstruct Congress's larger regulation of economic activity.[159] The Supreme Court acknowledged that one farm's production of wheat may likely have a trivial impact on the price of wheat, but when combined with other small farms' production of wheat, the effect could be substantial enough to subject the activity to regulation by Congress.[160] In sum, the Supreme Court recognized that Congress had a rational basis for its action and belief that, in totality, allowing homegrown wheat to escape federal regulation would have a substantially deleterious affect on interstate commerce and serve to defeat or obstruct the purpose of the AAA.

[C] *United States v. Lopez*

After *Wickard*, the Supreme Court did not find any federal legislation to be outside the scope of Congress's Commerce Clause authority for almost six decades, until it decided *United States v. Lopez*. In *Lopez*, the Supreme Court was asked to determine whether a federal statute making it a crime to knowingly possess a gun in a school zone—the Gun-Free School Zones Act of 1990—was an excessive and unconstitutional use of Congress's Commerce Clause power.

In deciding the case, the Supreme Court held that when the federal government, through its Commerce Clause power, regulates an activity that has nothing to do with

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[157] Under the disputed amendment to the Agricultural Adjustment Act of 1938, any farm that grew more wheat than permitted faced a fine. Mr. Filburn, the plaintiff in Wickard, owned a small farm in Ohio and faced such a fine for harvesting in excess of 239 bushels of wheat beyond the amount permitted under the Act. Filburn challenged the federal government's right to set quotas on wheat raised and consumed on his farm, based on the fact that such activity constituted local activity which at that time was beyond the scope of the Commerce Clause.

[158] *Wickard* at 125.

[159] *Id.* at 129.

[160] *Id.* at 128.

interstate commerce, it must do so under the notion that regulation of the non-economic activity is a necessary part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the noneconomic activity were regulated.[161] Specifically, the Supreme Court found that the legislation at issue in *Lopez*was purely "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms . . . [and] . . . is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[162] Additionally, the Supreme Court found no jurisdictional element in the statute that ensured firearm possession in a school zone affected interstate commerce.[163] Further, the Supreme Court found it significant that there were no "congressional findings regarding the effects upon interstate commerce of gun possession in a school zone" thereby weakening any substantial relation the offense would have to interstate commerce.[164] However, the federal government attempted to assert a "costs of crime reasoning" that: 1) possession of a firearm in a school may result in crime; and, 2) violent crime affects the functioning of the national economy on several levels (e.g., violent crime in a school reduces the schools' ability to educate children thereby making them less economically productive; violent crime reduces tourist's willingness to travel to areas of the country they believe are unsafe).[165] Nonetheless, the Supreme Court dismissed this assertion by concluding that, if it accepted the Government's "costs of crime reasoning," it would be hard-pressed to posit any activity that Congress is without power to regulate.[166]

[D] *United States v. Morrison*

Five years after the *Lopez* decision, the Supreme Court reviewed another federal statute that was being challenged as unconstitutional. In *United States v. Morrison*, the Supreme Court evaluated whether it was within Congress's regulatory power under the Commerce Clause to enact the Violence Against Women Act of 1994[167] which allowed victims of gender-motivated violence to bring a tort claim in federal court against the alleged perpetrator.

Ultimately, the Supreme Court struck down the statute as unconstitutional, and in doing so, employed the same analysis as in *Lopez*. The Supreme Court reasoned that

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[161] *United States v. Lopez*, 514 U.S. 549, 561

[162] *Id.*

[163] *Id.*

[164] *Id.* at 562–63.

[165] *Id.* at 564.

[166] *Id.* at 567–68.

[167] 42 U.S.C. § 13981.

"[G]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[168] Additionally, the Supreme Court commented that "[L]ike the Gun-Free School Zones Act at issue in *Lopez*, [this legislation] contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce."[169]

As in the *Lopez* case, the federal government did not contend that the statute at issue in *Morrison* was an essential part of a broader regulatory scheme aimed at regulating interstate commerce. However, the Supreme Court noted that, unlike *Lopez*, findings by Congress detailing the effects of gender-motivated violence existed. For example, Congress found that gender-motivated violence deterred potential victims from travelling interstate and from engaging in interstate employment and commerce.[170] Nonetheless, the Supreme Court gave virtually no deference to Congress's findings, reasoning that "[I]f accepted, [this] reasoning would allow Congress to regulate [anything] as long as the nationwide, aggregated impact . . . has substantial effects on employment, production, transit, or consumption."[171] Finally, the Supreme Court examined the degree of attenuation between the legislation and its effect on interstate commerce and concluded that if the legislation were found to be a valid exercise of Commerce Clause power, Congress would be able to regulate almost any non-economic activity through use of its Commerce Clause power.[172]

[E] *Gonzalez v. Raich*

After the Supreme Court rejected the federal government's ability to use its Commerce Clause power to regulate the apparent noneconomic activity targeted by the statutes at issue in *Lopez* and *Morrison*, it again changed course when it decided *Gonzalez v. Raich* in 2005. The petitioners in *Raich* were two California residents challenging the constitutional validity of a federal statute—the Controlled Substances Act (the "CSA")—which made it illegal to manufacture, distribute, or possess any controlled substance except as authorized under the CSA. Both petitioners had been arrested by the Drug Enforcement Agency for illegally cultivating marijuana—a controlled substance under the CSA—for personal medicinal purposes. The petitioners sought an injunction barring enforcement of the CSA against them and contended that Congress did not have the power under the Commerce Clause to regulate the interstate cultivation and possession of marijuana for personal medicinal purposes due to the activity being noncommercial in nature.

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[168] *United States v. Morrison*, 529 U.S. 598, 613 (2000).

[169] *Id.*

[170] *Id.* at 615

[171] *Id.*

[172] *Id.* at 616.

In deciding *Raich*, the Supreme Court held that, just as in *Wickard*,the federal government can regulate a purely intrastate activity that is not itself commercial if it has a reasonable basis to conclude that failure to regulate that class of activity would undercut a larger regulatory scheme.[173] Additionally, the Supreme Court announced that the standard for assessing the scope of the federal government's power under the Commerce Clause is not whether the activity at issue, when aggregated, substantially affects interstate commerce. Instead, the Supreme Court stated that the proper analysis involves an assessment of whether the federal government had a rational basis to conclude that the activity being regulated substantially affects interstate commerce.[174] In sum, the Supreme Court reasoned that Congress, when enacting the CSA, had "a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[175]

As to the previous precedents established in *Lopez* and *Morrison*(and important to determining whether the PPACA individual mandate will be upheld as constitutional) the Supreme Court clarified that in both prior cases, neither pieces of legislation at issue regulated any economic activity at all.[176] In contrast, the Supreme Court found that via the CSA, Congress was regulating marijuana grown for personal medical use and that this regulation was merely one of many "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut" without such regulation.[177]

[iv] Commerce Clause Analysis of the PPACA § 1501 Individual Mandate

[A] Does the PPACA Regulate Activity Substantially Affecting Interstate Commerce?

In evaluating the constitutionality of the PPACA's mandate for all individuals to buy minimum essential health care coverage, it is necessary to evaluate the PPACA under the primary factor stated in *Lopez* and *Morrison*—whether it regulates activity substantially affecting interstate commerce. In both *Lopez*and *Morison*, the federal statutes being challenged were struck down because they did not relate to economic activity. Conversely, the PPACA's regulation of the health care and health insurance industries is without question regulation of an economic activity substantially affecting interstate commerce. In fact, Congress included its own findings into the PPACA, concerning the extent to which the health insurance and health care industries impact

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[173] See *Gonzales v. Raich*, 545 U.S. 1, 18.

[174] *Id.* at 22.

[175] *Id.* at 19.

[176] *Id.* at 25.

[177] *Id.*, at 24.

our national economy, and why the requirement for individuals to maintain minimum essential health care coverage will bolster the national economy.[178]

To be sure, Congress makes it quite clear that § 1501 of the PPACA – the individual mandate – is aimed at regulating an "activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased."[179] To support this contention, Congress cites the fact that the health insurance and health care industries are a significant part of the national economy, based on the fact that national health care spending is projected to increase from $2.5 trillion (or 17.6% of the gross domestic product) in 2009 to $4.7 trillion in 2019.[180] Congress further found that, in 2009, private spending on health insurance reached approximately $854 billion, including payments for medical supplies, medical equipment, and prescription drugs that were shipped in interstate commerce.[181] These facts leave the federal courts hearing the Florida and Virginia complaints little room but to conclude that the PPACA's individual mandate is targeted at regulating activity, an individual's decision to purchase health insurance or self-insure (by not purchasing health insurance), that substantially affects interstate commerce.

[B] Can Congress Mandate Individuals to Engage in Activity Through Use of its Commerce Clause Power?

The Florida and Virginia complaints both allege that the individual "mandate" to purchase health insurance is beyond the scope of authority granted to the federal government under the Commerce Clause.[182] In fact, both complaints challenge whether the PPACA's mandate that all individuals must obtain qualified health care coverage even regulates activity.[183] Additionally, some opponents of health care reform assert that individuals "forced" to purchase health insurance are not, save for the PPACA mandate, participants in the health insurance marketplace and thus not engaged in an economic activity.[184]

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[178] PPACA § 1501.

[179] PPACA § 1501(a)(2)(A).

[180] *Id.* § 1501(a)(2)(B).

[181] *Id.*

[182] Case 3:10-cv-00091-RV-EMT at page 19, *see also* Case 3:10-cv-00188-HEH at page 5. Although often called a "mandate," as previously stated, the PPACA actually imposes a penalty on most individuals who fail to be covered by health insurance.

[183] *Id.*

[184] The Heritage Foundation, "Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional" 12/9/09, *see also* The Federalist Society, "Individual Health Care Insurance Mandate Debates" 11/6/09.

Unquestionably, Congress has generally used its Commerce Clause power to regulate individuals that have chosen to voluntarily participate in an activity substantially affecting the national economy. In both *Wickard* and *Raich*, the individuals being regulated by the federal legislation in question were voluntarily participating in activities (growing wheat and marijuana respectively) that were determined by the Supreme Court to have a substantial effect on interstate commerce. Despite this fact, statutes enacted under the federal government's Commerce Clause power exist today which require certain individuals to take action, and penalize such individuals for failing to take action.

For example, an individual who willfully neglects to comply with a court's child support order relating to the support of a child living in another state is subject to criminal penalties under the Child Support Recovery Act of 1992 (the "CRSA").[185] By its enactment, Congress implicitly determined that an individual's failure to engage in an activity—the payment of child support—had a substantial effect on interstate commerce and, in response, enacted CRSA.

In *United States v. Parker*,[186] Mr. Parker, a father who had failed to pay his court-ordered child support, contested Congress's ability to enact the CRSA using its Commerce Clause power, claiming that his decision to not pay child support was unrelated to interstate commerce. The District Court originally hearing the claim agreed with Mr. Parker and decided that willful failure to pay a court-ordered sum had nothing to do with interstate commerce.[187] However, upon review, the Third Circuit reversed the District Court's decision and concluded that the CRSA was a legitimate exercise of Congress's Commerce Clause power and was a valid regulation of activity having a substantial effect on interstate commerce.[188] In reversing the District Courts decision, the Third Circuit determined that the activity being regulated by the CRSA was a parent's willful *inactivity*—their failure to pay child support.[189]

Consequently, federal statutes (and federal case law vindicating the constitutionality of such statutes) currently exist and demonstrate the federal government's ability to

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[185] 18 U.S.C. § 228.

[186] 108 F3d 28 (3rd Cir. 1997).

[187] *U.S. v. Parker*, 911 F.Supp. 830, 834 (E.D. Pa. 1995).

[188] *See* United States v. Black, 125 F.3d 454 (7th Cir.1997); United States v. Williams, 121 F.3d 615 (11th Cir.1997); United States v. Crawford, 115 F.3d 1397 (8th Cir.1997); United States v. Bailey, 115 F.3d 1222 (5th Cir.1997); United States v. Johnson, 114 F.3d 476 (4th Cir.1997); United States v. Parker, 108 F.3d 28 (3d Cir.1997); United States v. Bongiorno, 106 F.3d 1027 (1st Cir.1997); United States v. Hampshire, 95 F.3d 999 (10th Cir.1996); United States v. Mussari, 95 F.3d 787 (9th Cir.1996); United States v. Sage, 92 F.3d 101 (2d Cir.1996), all upholding the CRSA as a valid exercise of Congress's Commerce Clause power.

[189] 108 F3d at 31.

use its Commerce Clause power to regulate inactivity, and coincidentally compel activity, when such inactivity substantially affects interstate commerce. Accordingly, the portions of the Florida and Virginia complaints that assert Congress is unconstitutionally regulating inactivity (i.e., a person's choice to not obtain minimum essential healthcare coverage) will likely be rejected by the federal courts in similar fashion to Mr. Parker's claim that Congress's Commerce Clause powers only exist to regulate activity.

[C] Does Congress Have a Rational Basis for Concluding that the Uninsured Have a Substantial Affect on Interstate Commerce?

In *Raich*, the Supreme Court plainly acknowledged the "rational basis" test as the standard by which all Commerce Clause cases should be determined, holding that "[W]e need not determine whether the activities [being regulated], taken in the aggregate, substantially affect interstate commerce in fact, but whether a rational basis exists for so concluding."[190]

In analyzing the connection between the mandate for minimum essential healthcare coverage and its effect on interstate commerce, one need only examine the total impact such a requirement would have on the health insurance and health care industries, which the PPACA clearly seeks to regulate. A mandate requiring all individuals to purchase minimum essential healthcare coverage would certainly promote the efficient flow of health care services in interstate commerce.

In the PPACA, Congress cites the fact that, in 2006, administrative costs for private health insurance companies rose to over $90 billion.[191] Without question, the rising costs of health care and health insurance are dilemmas this nation must confront and resolve sooner than later. In fact, Congress believes that the PPACA's § 1501 mandate will serve to increase the number of United States citizens with health care coverage and the size of health insurance purchasing pools in general, thereby reducing administrative costs and consequently lower health insurance premiums.[192]

Moreover, several studies have highlighted the annual impact that over 45 million uninsured citizens have on the United States' economy. These studies show that uninsured citizens place an enormous drain on the national economy as a whole. The Kaiser Commission on Medicaid and the Uninsured estimates that uninsured Americans require upwards of $40 billion in healthcare annually, with that cost, in large part,

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[190] *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

[191] PPACA § 1501(a)(2)(J).

[192] *Id.*

being borne by both the federal and state government.[193] Another study found that "the lost economic value to the U.S. each year is between $65 billion and $130 billion, not because of the cost of health services, but because of the poorer health outcome of those who are uninsured."[194] This same study further concludes that such an impact on business can be directly correlated to a necessary increase in the price of its products, thereby threatening its competitiveness in the global market.[195]

Furthermore, in PPACA § 1501, Congress cites the fact that, in 2008, the cost for providing uncompensated health care to uninsured persons was $43 billion.[196]o Congress further posits that most of this $43 billion cost was shifted from health care providers to private insurers and finally to consumers by private insurers increasing family premiums by, on average, over $1,000 a year.[197]

The individual mandate found in § 1501 of the PPACA will likely lower the number of uninsured persons in the nation and thereby reduce the burden uninsured persons place on the national economy. Additionally, by having more persons enter the insurance market, insurance companies' administrative costs will be dispersed over a greater number of consumers and, based on the economies of scale principle, consumers will have reduced costs when purchasing health insurance through the increasing size of the insurance purchasing pools. In light of these facts, Congress can clearly demonstrate that it had a rational basis for concluding that a person's choice to either purchase or not purchase health insurance is economic activity, that taken in the aggregate, substantially affects interstate commerce.

[D] Is the Individual Mandate an Essential Component of a Broader Regulatory Scheme Aimed at Regulating Economic Activity?

If the federal courts somehow find that the individual mandate in § 1501 of the PPACA does not itself regulate economic activity, or alternatively, activity of any sort, then based on the Supreme Court's holding in *Raich*, it is nevertheless necessary for the courts to determine whether the individual mandate is "an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut" without such mandate.[198] Even if the federal government were to inconceivably concede that the individual mandate is not commercial in nature, it can legitimately contend that the individual mandate is an essential part of the PPACA and Congress's

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193 www.healthinsurancecalifornia.biz/uninsured-individuals-economy.html (last visited 5/17/10).

194 http://knowledge.emory.edu/article.cfm?articleid=849 (last visited 5/24/10).

195 *Id.*

196 PPACA § 1501(a)(2)(F).

197 *Id.*

198 *Gonzales v. Raich*, 545 U.S. 1, 24 (2005).

overall regulation of the health care and health insurance industries as a whole.

Under this analysis, a federal court must consider whether the absence of the § 1501 individual mandate will serve to undercut Congress's attempt—by way of the PPACA and other legislation highlighted below—to regulate the health care and health insurance industries. In fact, the federal courts reviewing the Florida and Virginia complaints are obligated to analyze the federal government's involvement in regulating health care in order to determine whether a requirement to purchase health insurance is an integral component in its regulatory framework.

In fact, before the enactment of the PPACA, the federal government already had a significant role in regulating the health care industry.[199] With federal legislation already in existence that serves to regulate the health care and health insurance industries, such as the Employee Retirement Income Security Act ("ERISA")[200] and the Public Health Service Act ("PHSA"),[201] the federal government can legitimately assert that the individual mandate is essential to the orderly operation of these preexisting regulatory schemes. Indeed, Congress did exactly this when drafting § 1501 of the PPACA. Specifically, in § 1501, Congress references both ERISA and PHSA and specifies that without the individual mandate, both pieces of legislation will be much less efficacious in regulating the health insurance industry.[202]

Irrespective of ERISA and PHSA, the PPACA is itself is a sweeping piece of federal legislation regulating the health care and health insurance industries and, as resolved above, unquestionably involves the regulation of interstate economic activity. In vindicating the constitutionality of the PPACA, the federal government will likely assert that the individual mandate is an essential element of the PPACA, and without it, the PPACA will be unable to effectively regulate these industries. In fact, the federal government acknowledged this proposition in the text of the PPACA.

In § 1501 of the PPACA, the government emphasizes that, without the individual mandate, many individuals will wait to purchase health insurance until they need medical care.[203] The government further contends that, by increasing the number of persons in the nation having minimum essential healthcare coverage, health insurance risk pools will be broadened to include more healthy individuals, which in turn will lower health insurance premiums for individuals as a whole.[204] The government completes this portion of § 1501 by declaring the individual mandate is "*essential* to

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199 PPACA § 1501(a)(2)(H).

200 Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et. seq.).

201 Public Health Service Act (42 U.S.C. 201 et. seq.).

202 PPACA § 1501(a)(2)(H).

203 *Id.* at § 1501(a)(2)(I).

204 *Id.*

creating effective health insurance markets in which improved health insurance products . . . can be sold."[205]

Additionally, in § 1501, the government addresses its concern over private health insurance companies' rising administrative expenses that account for almost 30 percent of premiums they receive.[206] To this point, the government articulates that, by increasing the number of persons who have health insurance coverage, health insurance companies will be able to defray administrative costs across a larger base of customers, thereby reducing total administrative costs and in the process lower health insurance premiums.[207] Again, at the end of this portion of § 1501, Congress clearly states that "[T]he [mandate] is *essential* to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs."[208]

Based on the historical case evidence presented above, the federal courts, when reviewing the Florida and Virginia's assertions that the PPACA is an unconstitutional use of Congress's Commerce Clause power, should have no choice but to conclude, just as the Supreme Court found in the circumstances presented in *Wickard* and *Raich*, that the individual mandate found in § 1501 of the PPACA is "an essential part of [Congress's] larger regulation of economic activity."[209]

§ 9.04 CONCLUSION

If the Florida or Virginia complaints are successful in having the individual mandate in PPACA § 1501 declared unconstitutional, the state-run health insurance exchanges created by the PPACA will likely face serious problems in containing costs of their members' insurance premiums. Without the individual mandate, it is likely that many younger and healthier individuals will not obtain insurance coverage, while a significantly greater percentage of older and less healthy individuals will enroll in exchange health plans.

Under the PPACA, the health insurance exchanges are designed to operate by using community-rated premiums and guaranteed issue. Community-rated premiums operate in such a way that insurance companies do not take into consideration the individual's health status when determining the cost of health care coverage. Because community-rated premiums impose the same premium on low and high risk persons alike, the premiums paid by low risk persons exceed their actuarial fair market value, while premiums paid by high risk persons are lower than their fair market actuarial

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[205] *Id.*

[206] *Id.* at § 1501(a)(2)(J).

[207] *Id.*

[208] *Id.*

[209] *Gonzales v.* Raich, 545 U.S. 1 at 24.

value. Guaranteed issue implies that the insurer must accept all applicants that are willing to pay its community-rated premium.

[1] Adverse Selection and its Likely Manifestation in the Health Insurance Exchanges without an Individual Mandate

The prediction that a greater percentage of less healthy individuals will enroll in health coverage via the Health Insurance Exchanges without the individual mandate is based on the economic principle of adverse selection. Adverse selection, in the health insurance context, implies that an individual's propensity to purchase health insurance is directly correlated with their risk of loss. This is to say that the more likely a person is to need health care treatment, the more likely it is that person will purchase health care coverage. Consequently, there is a high probability that, without the individual mandate, the Exchanges' risk pools will comprise a large number of individuals with pre-existing illnesses that require substantial expenditures on their health care. This in turn will force the Exchanges to price insurance at a level higher than the amount healthier younger individuals will be willing to pay due to their perceived lower risk of requiring health care. Accordingly, it is likely that as Exchange insurance prices increase, many more healthy individuals will not purchase or renew their health insurance through the Exchanges and instead take their chances and go without health insurance. As these healthier individuals drop out of the Exchanges, fewer persons will be left to defray Exchanges' costs across. As a result, health insurance premiums will necessarily have to be further increased, and in doing so, even more individuals will likely drop coverage. This vicious cycle is likely to continue until reaching a point where Exchanges are no longer economically viable.

Congress itself acknowledged this concern in § 1501 of the PPACA, when it stated that if no individual mandate existed, individuals would wait to obtain health insurance until they needed health care.[210] Moreover, Congress believed that, by imposing an individual mandate, health insurance coverage within the nation would increase and thereby "minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals which will lower health insurance premiums."[211]

This health insurance adverse selection principle—in the absence of an individual mandate—has already transpired in the country. In 1993, the state of New Jersey began a health care coverage program called New Jersey Individual Health Coverage Program (the "NJICHP") which offered community rated and guaranteed issue premiums to its citizens.[212] At that time, no individual mandate was in effect in either New Jersey or the United States. Individual enrollment in the NJICHP program started

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211 *Id.*

212 *The New York Times*, "The Case for Mandating Health Insurance" 10/23/09.

at 40,000 in 1993 and grew to around 186,500 in 1996.[213] During this time period, many economic experts believe that health insurance adverse selection began to manifest itself.[214] From 1996 to 2001, individuals that obtained health care coverage through NJICHP program experienced a premium increase of around 200—300%.[215] Coincidentally, in 2001, enrollment in NJICHP sharply decreased to around 85,000.[216]

If the individual mandate is found unconstitutional and adverse selection manifests itself as it probably did in New Jersey's NJICHP program, it is likely that the Exchanges will not function the way Congress intended by providing a large number of individuals health insurance with community-rated premiums and guaranteed issue. Consequently, without the PPACA's individual mandate, the Exchanges that the PPACA creates will likely not be an economically viable way to provide health care coverage to individuals who cannot obtain insurance through their employers.

Furthermore, one of Congress's primary purposes for enacting the PPACA was to provide health care coverage, and thereby greater access to health care, for the nation's approximately 45 million uninsured individuals. One of the key ways this goal is to be achieved is via the operation of the Health Insurance Exchanges that accept free choice vouchers issued by the federal government to low-income individuals and families that either cannot afford to obtain insurance through their employer or are not offered health insurance by their employer. In fact, many of the country's uninsured are low income individuals or families that would only be able to obtain health insurance coverage by using free choice vouchers at the exchanges. If the Exchanges created by the PPACA cannot operate in a fiscally sound manner, due to the absence of an individual mandate and the emergence of health insurance adverse selection, it is likely that a large majority of the country's uninsured will remain so.

[2] Employers Must Begin to Prepare for other PPACA Provisions that Impact Their Health Plans and Take Effect within the Next Few Months

Employers should be cognizant that even if the Florida and Virginia lawsuits are successful, a host of PPACA provisions will remain applicable to employer-sponsored health plans. Although many PPACA provisions will not take effect for several years, employers of all sizes that offer health plans to their employees should definitely be aware of the provisions that will take effect within the next few months. These

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213 Alan C. Monheit, Joel C. Cantor, Margaret Koller and Kimberley S. Fox, *Community Rating And Sustainable Individual Health Insurance Markets in New Jersey*, 23, no.4 HEALTH AFFAIRS, 167, 168 (2004).

214 *The New York Times*, "The Case for Mandating Health Insurance" 10/23/09.

215 *Id.*

216 *Id.*

provisions may require changes in plan design or amendments to insurance contracts to ensure compliance with the new law. These changes will affect both insured and self-funded group health plans, and may require immediate action on the part of the employer.

[a] PPACA Provisions Requiring Immediate Action by All Employer-Sponsored Health Plans

In order for employer-sponsored health plans to be in compliance with certain PPACA provisions, the following changes will need to be implemented by such plans on the first day of the plan year following September 23, 2010:

[i] Coverage for Adult Children

Employer-sponsored group health plans will be required to make health care coverage available to plan participants' children who are not eligible for other employer-provided coverage and allow such children to remain on their parents' plan until the age of 26. All such children will be eligible for coverage irrespective of: the child's status as a dependent for income tax purposes; the residency of the child; and, the child's student, marital or employment status.

[ii] Restrictions on Annual and Lifetime Benefit Limits

Employer-sponsored group health plans will be prohibited from placing lifetime dollar limits on "essential health benefits" which include: ambulatory patient services; emergency services; hospitalizations; maternity and newborn care; mental health and substance abuse services; prescription drugs; rehabilitation services and devices; laboratory services; preventative and wellness services; chronic disease management; pediatric services; and, other services as defined by HHS. Additionally, employer-sponsored group health plans will not be allowed to institute unreasonable annual limits as defined by HHS.

[iii] Pre-existing Conditions

Employer-sponsored group health plans will no longer be allowed to impose pre-existing exclusions on children under age 19. (As of January 2014, employer-sponsored group health plans will no longer be allowed to impose pre-existing exclusions on any participants and beneficiaries.)

[iv] Rescission

Employer-sponsored group health plans (and their underlying insurers) will be prohibited from cancelling a plan participant's, spouse's, or dependent's health care coverage as permitted under the terms of the plan documents (e.g., termination of employment, reduction in hours, loss of eligibility status) unless the participant has engaged in fraud or intentionally misrepresented material facts.

[v] Over-the-Counter Medications

Effective January 1, 2011, all employer-sponsored group health plans offering Health Care Flexible Spending Account Plans and Health Reimbursement Accounts that currently cover over-the-counter medications will no longer be able to reimburse plan participants for expenses relating to non-prescribed over-the-counter medications (with the exception of Insulin). Health Savings Accounts will not be able to reimburse the cost of these over-the-counter medications on a tax-exempt basis.

[b] PPACA Provisions Requiring Immediate Attention by Employer-Sponsored Health Plans that are Not "Grandfathered" Under the PPACA

[i] Preventative Services

Newly created employer-sponsored group health plans that are not protected by the PPACA's grandfather rule will be required to cover—without use of cost sharing mechanism such as co-pays or deductibles—preventative care services such as well baby and well child care, mammograms, colonoscopies, and other certain services recommended by the U.S. Preventative Services Task Force or the Centers for Disease Control.

[ii] Choice of Health Care Provider and OB/GYN Referrals

Plan participants will be permitted to select their (and their dependents') primary care provider from any provider participating in the plan's network. Additionally, a primary care provider's authorization or referral will not be required for obstetrical or gynecological care provided by a physician participating in the network.

[iii] Emergency Care Services

Plan participants will be entitled to receive emergency care services without prior authorization regardless of whether the emergency health care provider is a participating provider in the network. If emergency services are rendered out of network, the plan's cost-sharing requirements must be the same as those that would apply if the provider were in-network.

[iv] Effective Internal Appeals Processes

For plan years beginning after September 23, 2010, all non-grandfathered employer-sponsored group health plans must institute an effective internal appeals process and provide notice to plan participants of the existence of internal and external appeals processes. Also, employer-sponsored health plans must allow plan participants to review their files and present evidence and testimony during the internal appeals process. Plan participants must continue to receive health care coverage pending the

outcome of the appeals process.[217]

[3] Employers Must Watch for Regulations to be Issued by Federal Agencies Regarding Interpretation and Enforcement of the PPACA's Provisions

In addition to these statutory changes, all employers must keep abreast of any initial guidance issued by the federal agencies tasked with enforcing the PPACA's provisions, and should take steps to determine their future obligations and potential liabilities under the new laws. For example:

- How will the law, particularly the definition by HHS of an essential benefit package, affect employers who sponsor HSAs? Will an exception be made for these types of plans or will the definition force employers to abandon their HSAs/high deducible plans?
- Will any employee be responsible for a group health plan contribution that exceeds 9.8% of his income, thereby exposing the employer to the $3,000 penalty?
- For employers who provide retiree healthcare benefits, should coverages be adjusted due to the taxation of the Medicare Part D subsidy and the changes to Medicare reimbursement?
- For employers with "Cadillac" plans, should the coverage provisions of the plan be adjusted to prevent the taxation of group health care coverage?
- With the increase in wellness incentives, should employers consider wellness programs as an integral part of their health program?

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[217] PPACA § 1001 (adds PHSA § 2713).