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HEALTH CARE REFORM: IS THE INDIVIDUAL MANDATE CONSTITUTIONAL?

Abigail Schopick

I. Introduction

On March 23, 2010, President Barack Obama signed the “Patient Protection and Affordable Care Act” (hereinafter “PPACA” or “the Act”) into law. Since PPACA was enacted, a number of legal challenges have been brought against the Federal Government alleging that PPACA, and specifically the provision requiring all citizens to purchase and maintain adequate health insurance or else pay a penalty (hereinafter “individual mandate”), is unconstitutional. Five of these lawsuits have already had preliminary decisions made as to the courts’ determinations of whether PPACA and the individual mandate are constitutional. The Richmond Division of the District Court for the Eastern District of Virginia decided Virginia ex rel. Cuccinelli v. Sebelius on August 2, 2010. Likewise, the Southern Division of the Eastern District of Michigan decided Thomas More Law Center v. Obama, on October 7, 2010. Just one week later, the Pensacola Division of the Northern District of Florida decided Florida ex rel. McCollum v. U.S. Department of Health & Human Services on October 14, 2010. Most recently, the District Court for the District of Columbia decided Mead v. Holder on February 22, 2011.

This paper argues that despite the arguments made by the Plaintiffs in the various cases, PPACA, in its current state, is constitutional. Part II of this paper examines the background and rationale for PPACA and explores the current interpretation of the Commerce Clause, as determined by the U.S. Supreme Court. Part III of this paper examines some of the issues that have been agreed by the Plaintiffs. This paper will show that individuals, businesses and states have standing to pursue their claims against PPACA in the Federal District Courts, and that the claims are ripe. This paper will also argue that the penalty for non-compliance with the individual mandate is not a tax, and therefore is not controlled by the Anti-Injunction Act. Additionally, although the type of activity authorized by PPACA and the individual mandate has never been viewed previously by the courts, the activity is economic activity that is validly authorized under the Commerce Clause of the United States Constitution. Part IV concludes that in further litigation on these cases, and in other challenges, courts should find PPACA and the individual mandate constitutional.

II. Background

PPACA was passed by both Houses of Congress and signed into law by President Obama in March of 2010. Congress passed PPACA in an attempt to fix America’s health care system. One of the major goals of the Act is to reduce substantially the number of uninsured Americans, people who cost taxpayers billions of dollars per year in uncompensated care.

The individual mandate is one way that Congress sought to meet this end. Beginning in 2014, the individual mandate requires that, unless a person fits into a few narrow exceptions, all Americans will be required to purchase some form of health insurance or be subject to a penalty.

In Perez v. United States, the Supreme Court clarified its interpretation of the Commerce Clause. Perez explained that Congress’s power to regulate under the Commerce Clause is threefold: Congress can regulate: “[1] the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities [substantially] affecting interstate commerce.” The third prong is the focus of the current constitutional debate over the individual mandate in PPACA. Although Congress is generally authorized to regulate commercial activities, an activity can only be validly regulated under the Commerce Clause if the Government can demonstrate that the activity in question does in fact have a substantial effect on interstate commerce.

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III. Analysis

A. The Plaintiffs Have Standing to Sue the Government in the Federal Courts, and the Claims They Raise Are Ripe For Adjudication.

1. Standing

According to the United States Constitution, in order for someone to bring a lawsuit, they must have...
a case or controversy. In Lujan v. Defenders of Wildlife, the Supreme Court set forth three elements necessary to establish standing: (1) the plaintiff must have actually suffered an injury; (2) there must be a connection between the injury and the action they are claiming caused the injury; and (3) it must be likely that the court can remedy the wrong if they find for the plaintiff.

In the PPACA cases, the Plaintiffs claim they have standing because of both a present and a future harm that they say will definitely come to them due to both the individual mandate and the penalties associated with it. The Government, however, claims that the Plaintiffs do not have standing because no injury has actually happened as of yet. In Whitmore v. Arkansas, the Supreme Court determined that, in order for a plaintiff to have a valid injury in the present when the actual injury will happen in the future, the “threatened injury must be certainly impending.”

In Thomas More Law Center, Florida and Mead, the Plaintiffs claim that although the financial burden from PPACA will not officially come until 2014, there is an actual present harm because they are currently being forced to begin rearranging their finances in preparation for either having to buy health insurance or having to pay a penalty in the future. The Government, in all three cases, claims that it is speculative to assume that the Plaintiffs will be forced to buy insurance or pay a penalty in 2014 because the Plaintiffs’ circumstances may change by then. The Government claims that a Plaintiff may have employer provided health insurance in 2014, a Plaintiff may qualify for an exemption in 2014, or there is the unfortunate possibility that a Plaintiff will be dead in 2014. Additionally, in Mead, the Government points out that the named Plaintiff will be eligible for Medicare Part A by 2014. The Defendants claim it is impossible for the courts to assume definitively that harm will come to the Plaintiffs, leading to their belief that the Plaintiffs have no standing.

As stated in Whitmore, a plaintiff can have an injury in fact, even for a future injury, as long as the injury is certain to happen. In the case of PPACA, the Act has been passed into law and the individual mandate provision will go into effect in 2014. The Government has asserted that the individual mandate is an essential feature of PPACA, so it is unlikely that the individual mandate would cease to exist at any point between the present and 2014 without the entire Act being invalidated by the Courts. Therefore, the Plaintiffs’ argument that they possess an injury in fact, even if the actual injury will not happen until 2014, is persuasive.

The Plaintiffs claim that they also have a present injury because they currently have to begin to reorganize their financial affairs and undertake major changes to their financial planning to prepare for the future costs associated with PPACA. In Mead, one Plaintiff specified that she would have to save money to pay the Act’s penalties that she would otherwise set aside for her children’s college funds. They contend that, even though the provision does not go into effect until 2014, there is an economic injury now, and an economic injury has been found to be enough for standing. This argument is persuasive. Plaintiffs argue that the current need to begin saving money and the need to reorganize business affairs to prepare for the requirement that they purchase health insurance or pay a penalty in the future is a legitimate current economic injury.

The Plaintiffs in these cases have standing to challenge the Act. Of the standing requirements set forth in Lujan, the only one really in question is whether the Plaintiffs do, in fact, have an injury. The Plaintiffs do have a clear future injury that is certain to occur because in 2014 they will be required either to buy health insurance or pay a penalty, reappropriating financial resources not currently dedicated to such a purpose. The Plaintiffs also have a present injury because of the immediate need to begin reorganizing their finances in order to prepare for the future costs associated with PPACA and the individual mandate.

Therefore, the Plaintiffs have injuries in fact and, consequently, have standing to sue the Government.

2. Ripeness

A court can legally determine the outcome of a case only if “the state of [the] dispute has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.” If a case is brought before the court on “contingent future events that may not occur as anticipated, or indeed may not occur at all,” the case may not be ripe for adjudication. If it is inevitable, however, that the statute will affect the plaintiffs, even if there is a time gap between the present and the beginning of actual enforcement of the provision, there is a clear controversy that allows litigation. To determine ripeness, the Supreme Court has established a two prong test. A court first must evaluate whether the issues in the case are rightly before the given court; and second, must determine whether withholding the judicial process from the parties until a later date would cause them hardship.

Defendants in the PPACA cases contend that the issues at hand are not ripe because no harm can come to the Plaintiffs until the provision goes into effect in 2014.
The Government additionally contends that, as to the second prong of the Supreme Court’s ripeness test, because the Plaintiffs are not currently being asked to take any action, there is no hardship to the Plaintiffs in being asked to wait to adjudicate at a later date.46

“The Supreme Court has long… held that where the enforcement of a statute is certain, a pre-enforcement challenge will not be rejected on ripeness grounds.”47 As stated above, the harm the Plaintiffs are alleging is certain to occur from PPACA will in fact happen in 2014. Additionally, there is a real present harm to the Plaintiffs in that they currently have to begin altering their finances in preparation for spending more in 2014, either for health insurance or as a penalty or for failing to comply with the individual mandate. Because the Plaintiffs currently have a real harm, the issues should be considered ripe.

Theoretically, the Government should also want this issue decided as soon as possible. The court in Thomas More Law Center points out that the Government likely would want to know “whether an essential part of its program regulating the national health care market is constitutional.”48 If courts, especially the Supreme Court, were to determine that PPACA is unconstitutional, the Government should want to know so it can act by making changes to ensure that a constitutional form of PPACA can be enacted. Therefore, the issues in question are ripe for adjudication. Both sides should want the issues litigated as quickly as possible so they can begin preparing in earnest for the changes to come if the Act is constitutional, or so the Government can make amendments to the Act or plan to abandon the law if PPACA is deemed unconstitutional.

B. The Penalty for Non-Compliance with the Individual Mandate is Not a Tax and Therefore is Not Controlled by the Anti-Injunction Act.

“The Congress shall have power to lay and collect taxes . . . for the . . . general welfare of the United States . . . [and] to make all laws which shall be necessary and proper for carrying into execution the foregoing Powers.”49 The Anti-Injunction Act prevents taxpayers from bringing suit against the Internal Revenue Service (IRS) to question an action of the IRS that either has or will result in the assessment or collection of a tax.50

The question here is whether the penalty for non-compliance with the individual mandate is or is not a tax. In previous versions of the Act prior to enactment, Congress referred to the fine for non compliance with the individual mandate as a tax.51 In the final version, however, Congress made a conscious decision to change the wording of the fine, by calling it a penalty.52 When Congress purposely deletes language from a version of legislation, it is assumed that the Members did not intend the previous language to become law.53 Additionally, the Act does contain numerous taxes that are in fact referred to as taxes.54 When a piece of legislation contains specific language in one portion, but omits that language in another portion, courts should not assume that Congress intended the omitted language to become law.55

Congress, by changing to a penalty what it had previously called a tax, did not intend for the fine imposed on any individual who does not comply with the individual mandate and does not qualify for an exemption to be considered a tax. Although the penalty language is located within the Internal Revenue Code,56 it is not otherwise treated like a tax and was not intended to be a tax. Therefore, the Anti-Injunction Act does not apply, as its scope reaches only suits brought to question the assessment and collection of an actual tax.57 Additionally, because the penalty is not a tax, Congress cannot rely on the General Welfare Clause to reaffirm the assertion that PPACA is constitutional since the General Welfare Clause only applies to taxes.58 The Government must rely on the Commerce Clause to determine the constitutionality of PPACA.59

C. Although the Type of Activity Mandated by PPACA and the Individual Mandate Has Never Been Viewed by the Courts Before, it is Economic Activity that Is Validly Authorized Under the Commerce Clause of the United States Constitution.

Under the Commerce Clause,60 Congress may regulate (1) “the use of channels of interstate or foreign commerce which Congress deems are being misused . . . [(2)] protection of the instrumentalities of interstate commerce . . . [and (3)] those activities affecting commerce.”61 In the recent cases challenging the constitutionality of PPACA, Plaintiffs assert that the individual mandate does not legally qualify for regulation by Congress under the Commerce Clause because the individual mandate is not regulating activity; rather, it is regulating inactivity.62 The Supreme Court has said, however, that even if a questioned activity “may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”63

The individual mandate seeks to penalize citizens who elect not to purchase health insurance by 2014 but do not fall within one of the listed exemptions.64

The increased costs to the health care providers, the Government, and the taxpaying public are in fact affecting the market that the Plaintiffs are claiming they have chosen not to be a part of.”
Plaintiffs argue that the “power to regulate activity does not permit Congress to forbid inactivity.”65 They also contend that “[t]he act . . . compels all Americans to perform an affirmative act or incur a penalty, simply on the basis that they exist and reside within any of the United States.”66 In response, Defendants argue that requiring citizens to purchase health insurance or incur a penalty is not penalizing inactivity, because choosing not to purchase health insurance is a decision that still has a substantial effect on the overall health care market.67 The Defendants reason that, at some point in all citizens’ lives, they will need to avail themselves of the health care market.68 The Government argues that the Act is not regulating inactivity, as the Plaintiffs argue, but is rather “regulat[ing] economic decisions on how to pay for those services – whether to pay in advance through insurance or attempt to do so later out of pocket – decisions that substantially affect the vast, interstate health care market.”69

There is no true precedent for whether deciding not to purchase mandated health insurance constitutes economic activity under the Commerce Clause. The closest cases for precedent are Wickard v. Filburn,70 Heart of Atlanta Motel, Inc. v. United States71 and Gonzales v. Raich.72 The courts that have already looked at the constitutionality of PPACA, however, are divided as to whether they believe the precedents set forth in Wickard, Heart of Atlanta and Raich help the Plaintiffs or the Defendants.73

In Wickard, the Plaintiff argued that, although he was growing more wheat than the allowable amounts, the excess should not be subject to penalties since the excess was purely for personal use.74 He argued that, because he was not intending the excess to enter the commercial market, Congress should not be able to regulate it.75 The Court ultimately determined that although the Plaintiff did not intend for his excess wheat to enter the commercial market, he was still affecting such market.76 If he was using his own excess wheat for personal consumption, he was pulling himself from the commercial market that he should have been taking part in.77

In Heart of Atlanta Motel,78 the Plaintiff, a motel owner, questioned the constitutionality of the Civil Rights Act of 1964.79 The Plaintiff did not wish to be forced to accept African American guests into his motel, and believed that the Civil Rights Act had no business forcing him to do so since his business was local and not interstate.80 The Court, however, determined that, although his business was local, it was a motel, which by its very nature impacts interstate commerce.81 In determining that the Plaintiff did not have a viable Commerce Clause case, the Court pointed out that “[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”82

In Raich, the Plaintiffs were California residents with prescriptions for medical marijuana.83 They brought suit after federal agents, relying on the Controlled Substances Act (CSA),84 seized marijuana plants that one Plaintiff had been growing at home.85 The Plaintiffs claimed that enforcing the CSA against people with legitimate medical needs and prescriptions for the drug violates the Commerce Clause.86 The Court determined that, much like in Wickard, “the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.”87 The Court determined that restricting such activity was acceptable under the Commerce Clause because it was clearly what Congress intended with the entirety of the regulatory scheme set forth in the CSA.88

Courts examining PPACA also looked at United States v. Lopez89 for guidance on whether the Act is constitutional under the Commerce Clause. In Lopez, a high school student was charged with violating the Gun Free School Zones Act of 199090 by carrying a concealed weapon into a school zone.91 The Court determined that the Gun Free School Zones Act was unconstitutional because it exceeded Congress’s power under the Commerce Clause.92 The Court reasoned that possession of a gun in a school zone does not in any significant way impact interstate commerce. Therefore, the Gun Free School Zones Act of 1990 was unconstitutional under the Commerce Clause since Congress lacked the authority to pass it.93

Courts that have already looked at the constitutionality of PPACA are divided as to whether the above cases support the Act’s constitutionality or support the belief that the Act is unconstitutional.94 The question will ultimately be what the Supreme Court believes the above cases have done to the breadth and scope of the permissibly regulated activities under the Commerce Clause.

The Thomas More Law Center court argued that, with the decisions in Wickard and Raich, “the Supreme Court sustained Congress’s power to impose obligations on individuals who claimed not to participate in interstate commerce, because those obligations were components
of broad schemes regulating interstate commerce. In both these cases, the Plaintiffs were claiming that their actions were not activity impacting interstate commerce because their actions were conscious decisions to keep their activities out of the commercial market. In both cases, however, the Court said that by choosing not to participate in a given market, the Plaintiffs were still substantially impacting the market. A commercial market depends on people participating in it. If a large number of people who could and should be taking part in the given market decide to act on their own, their withdrawal from the market has a negative impact. Therefore, under their power to regulate activity that has an effect on interstate commerce, Congress has the ability to regulate the activity of people choosing not to participate in the commercial market, which can also be thought of as the individual’s theoretical inactivity in the commercial market.

The court in *Mead* similarly reasoned that *Wickard* was analogous to PPACA. The court argued that Congress’s authority to regulate both insurance markets and the price of insurance policies “has been long established.” The court asserts that the decision to buy health insurance, or to decline to do so, is a choice relating to the consumption of a commodity that affects the economy. When individuals forego the option to purchase health insurance and subsequently incur health care costs that they cannot pay, the debt leads to higher insurance premiums for the rest of the population. The court describes the effect as “strikingly similar to that described in *Wickard*.” The *Mead* court also belittled the Plaintiffs’ argument that it is an inactive choice, labeling it “pure semantics.”

The Supreme Court, however, has not validated unlimited use of the Commerce Clause. In *Lopez*, the Supreme Court determined that Congress was not permitted to “pile inference upon inference” to establish activity that would have a substantial enough impact on interstate commerce to fall within Congress’s Commerce Clause authority. The Supreme Court has also said that Congress cannot use speculation to assert that violence can be regulated under the Commerce Clause. Essentially, if the activities in the legislation are not actually commercial, Congress is not permitted to stretch and speculate to find a rationale for regulating the activity under the Commerce Clause. If there is an economic rationale for the regulation, however, Congress can regulate the activity under the Commerce Clause, even if the laws are actually regulating a person who is trying not to participate in a market that he or she should be participating in.

To determine whether an activity can be regulated under the Commerce Clause, the courts need to understand what impact the specific activity has on the commercial market that it is intended to be a part of. In the case of PPACA, the legislation is intended to impact the health care insurance market and the health care services market in general. Congress has made it clear that the individual mandate, which the Plaintiffs claim is unconstitutional, is an essential portion of the greater Act.

Whether an individual has health insurance or not, at some point in their lives, they will have to partake in the health care market, whether it is at a doctor’s office, an urgent care center, or a hospital emergency room. The health care market is a large, interstate market that consists of various providers of health care services, which can be paid for by private or public insurance, or out of pocket. The goal of PPACA is to eliminate the out of pocket payments for direct health care services. Individuals who choose to pay out of pocket for any encounter they have with the health care market are generally hoping that nothing major happens to them that would cause a large expenditure that they cannot afford. Unfortunately, however, many of them do not realize how expensive even a simple visit to an urgent care clinic can be without insurance. Although many people who choose not to purchase insurance save enough money for times when they need to see a doctor or get a prescription, they often do not have the money to finance an emergency, since even just being seen and released in an emergency room costs an incredible amount. Those unpaid costs end up going back on other taxpayers through increased costs to keep public hospitals open, increased insurance premiums, lost costs for health care providers, or increased costs for the local governments. Unlike other economic markets, hospitals are legally prohibited from turning down individuals that cannot pay. PPACA was passed by Congress in an attempt to help curb these added costs that could be prevented if people just acted responsibly and got health insurance.

The Defendants argue that by choosing not to purchase health insurance, the Plaintiffs and others who make the same decision, are in fact having a substantial impact on the health care market. The increased costs to the health care providers, the Government, and the taxpaying public are in fact affecting the market that the Plaintiffs are claiming they have chosen not to be a part of. The argument made by the Defendants that, whether people choose to or not, all citizens, at some point, take advantage of some aspect of the health care market is valid. The Plaintiffs want to choose how to take part in the market, but they are not actually choosing not to take part in the market. The Government is within its rights to regulate an interstate commerce market, such as the health care services market, and require that citizens choose the method of entry into the market that would cost taxpayers the least overall. That is exactly what Congress is doing by requiring anyone who may take part in the market, namely all citizens, either to purchase health insurance or pay a penalty for choosing a method that will have a negative financial impact on the Government and all taxpayers. As the *Thomas More Law Center* court said, “[t]he plaintiffs have not opted out of the health care services market because, as living, breathing beings, . . . they cannot opt out of this market.”

Even if the Plaintiffs, by choosing not to purchase health insurance, were opting not to participate in the health care market, that still would not preclude Congress’s ability to regulate an individual’s decisions. As the Supreme Court has already determined, if Congress has the authority to regulate an interstate commercial market, it also has the ability to regulate those persons who choose not to participate in it. Because of that authority, even if a court determined that the Plaintiffs were legitimately choosing not to be a part of the health care market, since the health care market can be regulated and involves interstate commerce, the individual mandate is constitutional, because either: (1) the Plaintiffs’ actions are part of the market and can be regulated; or (2) they are opting out of a market and can still be regulated.

According to the Government, the individual mandate is an essential component to the overall Act. Because the Act also requires, beginning in 2010 for children and 2014 for adults, that insurance companies do not discriminate against individuals with pre-existing conditions, thereby allowing these individuals to access reasonably priced health insurance, the Government asserts that without the individual mandate, individuals...
wishing not to purchase health insurance would then have an even greater incentive not to purchase health insurance.120

Without the pre-existing conditions provision, it becomes prohibitively expensive for an individual who initially chooses not to purchase health insurance to then purchase insurance upon diagnosis of cancer or heart disease, assuming that the individual even _wants_ a plan that will insure his or her condition. Some plans will insure sick individuals, but will not pay costs associated with their diseases under the premise that insurance companies are not liable for individuals’ pre-existing conditions. This system creates an incentive for individuals to purchase insurance before they get sick. Unless people are independently wealthy, they will not be able to pay for either the costs of health insurance after they get sick or the costs of treatment for whatever disease they now have.

After the pre-existing conditions provision goes into effect, however, the Government argues that, if people are not required by the individual mandate to purchase insurance, they will have an incentive not to purchase insurance until after they get sick.121 This assertion by the Government comes about because after the pre-existing condition provision goes into effect, if a person becomes seriously ill, there will be insurance exchanges established that will still allow the individual to purchase moderately priced health insurance.122 Additionally, under the new law, the insurance that the sick individual purchases after he or she gets sick will be required to cover the serious illness.123 If, in 2014, individuals were not required to have and maintain health insurance coverage, there would be many individuals who would elect not to purchase insurance knowing that if they got sick they would still have access to fairly affordable insurance at that time. Although Congress has established these exchanges to prevent the discrimination against sick individuals that has gone on for far too long, this coverage, although reasonably affordable to the individual, will likely still be more expensive than normal insurance would be.124 Sick individuals, who are by their very nature more expensive to insure, will still be a financial drain on the health care system if they are purchasing insurance only after they get sick.

PPACA has a dual purpose of lowering health care costs generally in America and making sure that most uninsured Americans get health insurance coverage.125 As of 2009, there were 50.7 million uninsured Americans, up from 46.3 million just a year earlier, which is a serious and costly problem for the United States.126 Without the individual mandate, and given the pre-existing conditions provision, it would be likely that, instead of PPACA creating less uninsured Americans, it would instead cause more Americans to opt not to purchase health insurance until they have a serious illness, leading to a bigger uninsured problem than currently exists in the United States.

Because of this potential problem, Congress theorized that the individual mandate was essential to the entirety of the regulatory scheme created by PPACA. The Supreme Court has long made it clear that if a provision of a regulation is essential to the overall regulatory scheme, the legislation would become futile if the provision were eliminated or not followed.127 Therefore, Congress is within its rights to regulate the health care market even if what the Plaintiffs argue is valid and Congress is regulating the Plaintiffs’ decision not to take part in the market, since that decision will still have a substantial impact on the overall regulatory scheme.

IV. Conclusion

The Commerce Clause128 allows Congress to regulate (1) “the use of channels of interstate or foreign commerce which Congress deems are being misused . . . [(2)] protection of the instrumentalities of interstate commerce . . . [and (3)] those activities affecting commerce.”129 The Plaintiffs, who believe that the individual mandate is an unconstitutional overextension of the Commerce Clause, argue that Congress is asking the Government to regulate inactivity instead of the required activity.130 Even if the questioned activity does not directly affect interstate commerce, as long as the activity has an impact on the greater commercial market, Congress can regulate it within the Commerce Clause.131

The Plaintiffs’ assertion that Congress is regulating inactivity is invalid, since all United States citizens will at some time or another need to avail themselves of the health care market; it is not a market that any American citizen can opt out of.132 This is a case of _first impression_ because PPACA is requiring the expansion of the Commerce Clause to regulate in a way it has never had before. In previous cases, notably in _Raich_, _Heart of Atlanta Motel_, and _Wickard_, the courts regulated markets that not all people would ever take part in. Once an individual decided to take part in the market, even if it was a decision to be involved in the activity but not in the market, Congress was allowed to regulate the individual’s activity. On the other hand, PPACA is asking the courts for permission to regulate a market that, as the Government correctly asserts, people do not have the option to opt in or out of. Simply by being alive, at some point in their lives, all citizens will have to take advantage of the health care market.136

As the _Florida_ court explained, the “case law is instructive, but ultimately inconclusive because the Commerce Clause . . . [has] never been applied in such a manner before.”137 The constitutionality of PPACA will ultimately have to be decided by the Supreme Court, since there is no precedent completely on point. When one or all of the cases ultimately gets to the highest court, the Supreme Court should agree with _Thomas More Law Center and Mead_ that, although this is an application of the Commerce Clause that has never been looked at before, it is a legitimate and constitutional expansion of the Commerce Clause. The individual mandate and PPACA should ultimately be considered constitutional.

2. Id. at § 1501.
5. 716 F. Supp. 2d 1120 (N.D. Fla. 2010).
6. In addition to the individual plaintiffs and the National Federation of Independent Business, the States of Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington joined the State of Florida as Plaintiffs in this suit.
10. Id.
13. Id. (establishing the individual mandate and exempting, among others,
religious objectors, some people who cannot afford coverage, Indian tribe members, those illegal immigrants, prisoners and those not covered for less than three months during the previous year).

14 Id.
16 U.S. Const. art. I, § 8, cl. 3 (giving Congress the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).
18 United States v. Lopez, 514 U.S. 549, 567 (1995) (showing that in order for Congress to have regulatory power over an activity, the activity has to be shown to actually be linked to interstate commerce).
19 U.S. Const. art. III, § 2.
21 Id.
23 Id.
25 Id.
26 Id.; Mead, 2011 WL 611139 at *5.
28 Id.
29 Mead, 2011 WL 611139 at *5.
30 Id.
31 495 U.S. at 158.
33 Id. (“The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.”).
39 Florida, 716 F. Supp. 2d at 1144.
40 BLACK’S LAW DICTIONARY (9th ed. 2009).
44 Id.
46 Id.
51 America’s Healthy Future Act of 2009, S. 1796, 111th Cong § 1301 (2009) (referring to what is later called a penalty as an “Excise tax on individuals without essential health benefits coverage”).
52 Florida, 716 F. Supp. 2d at 1134-36.
54 Pub. L. No. 111-148, supra note 1; Florida, 716 F. Supp. 2d. at 1135 (listing places within the Act that include taxes: “Excise Tax on Medical Device Manufacturers, § 1405 (‘There is hereby imposed on the sale of any taxable medical device by the manufacturer, producer, or importer a tax’); Excise Tax on High Cost Employer-Sponsored Health Coverage, § 9001 (‘there is hereby imposed a tax’); Additional Hospital Insurance Tax on High-Income Taxpayers, § 9015 (‘there is hereby imposed on every taxpayer a tax’); Excise Tax on Indoor Tanning Services, § 10907 (‘There is hereby imposed on any indoor tanning service a tax’).”
55 Hodge v. Muscattine Cnty., 196 U.S. 276, 279-80 (1905); see also Duncan v. Walker, 533 U.S. 167, 173 (2001) (stating that Congress normally acts with purpose and if they included specific wording in one section but left it out in another, they probably meant it that way).
58 U.S. Const. art. I, § 8, cl. 3 (giving Congress the power to “lay and collect taxes . . . to provide for the common Defense and General Welfare of the United States”).
59 Florida, 716 F. Supp. 2d at 1144 (“The defendants may not rely on Congress’s taxing authority under the General Welfare Clause to try and justify the penalty after-the-fact. If it is to be sustained, it must be sustained as a penalty imposed in aid of an enumerated power, to wit, the Commerce Clause power.”).

Thomas More Law Ctr., 720 F. Supp. 2d at 892.

Id.

Id.


Id. at *15 (citing United States v. South-Eastern Underwriters Ass’n, 332 U.S. 533, 552-53 (1944)).

Id.

Id. at *15-16.

Id.

Id. at *18.


See Pub. L. No. 111-148, supra note 1, §1501 (“The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.”).


See Physician and Hospital Pricing of Common Outpatient Procedures– Gross Charges, State of Vermont (2009) (finding that without insurance, a visit to an ER can cost, on average between $226 and $1226, not including any procedures).

Thomas More Law Ctr., 720 F. Supp. 2d at 893.

See Mead, 2011 WL 611139 at *18-19 (arguing that the aggregated effect of the Emergency Medical Treatment Act of 1986, which prohibits turning away patients in need of emergency care in most hospitals, and obligations to provide care at minimal charge to indigent members of communities, means deciding whether to purchase insurance is “ultimately a decision as to how health care services are to be paid and who pays for them”).


Thomas More Law Ctr., 720 F. Supp. 2d at 893.

Id. at 894.

See Gonzales v. Raich, 545 U.S. 1, 30 (2005) (determining that just because the Plaintiff chose to grow marijuana at home instead of purchasing it from the commercial market did not remove the Plaintiffs from the market, and Congress could legitimately regulate the actions); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (determining that the Plaintiffs decision to grow excess wheat for personal use still subjected him to regulation because his actions were having a substantial impact on the greater commercial market).

Pub. L. No. 111-148, supra note 1, §1501 (“The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.”).

Id. §1101 42 U.S.C. § 18001(d)(3).


See id.


Id. § 1101, 42 U.S.C. § 18001(g)(2).

See Press Release, U.S. Dep’t. of Health & Human Services, HHS Secretary Sebelius Announces New Pre-Existing Condition Insurance Plan (July 1, 2010) (stating that the insurance exchanges will not have higher premiums that other insurance, but will include some cost-sharing).


See Gonzales v. Raich, 545 U.S. 1, 19 (2005) (determining that Congress should have the ability to control home grown marijuana in California because not controlling it would defeat the regulatory scheme set forth in the Controlled Substances Act); Wickard v. Filburn, 317 U.S. 111, 129 (1942) (establishing that Congress is within its rights to consider activity outside of the direct intention of a regulation if the provision that is being violated is causing problems to the overall regulatory scheme).

U.S. Const. art. I, § 8, cl. 3 (giving Congress the power “to regulate Commerce . . . among the several States”).


Wickard, 317 U.S. at 125 (explaining that even if an activity on its own would not be considered commercial activity, if the impact of the activity does impact commerce, Congress is entitled, under the Commerce Clause, to regulate the activity).

Memorandum in Support of Defendant’s Motion to Dismiss at 2, Virginia ex rel. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010) (No. 3:10cv188); Mead at 18-19.

See generally 545 U.S. 1 (2005) (holding that, under the commerce clause, Congress could criminalize the production and use of medicinal marijuana).

See generally 379 U.S. 241 (1964) (holding that Congress could use the commerce clause to ban racial discrimination in public places).

See generally 317 U.S. 111 (1942) (holding that the government could regulate a farmer using excess wheat solely for personal use under the commerce clause).
