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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STEVE BALDWIN and **PACIFIC JUSTICE INSTITUTE**, **Plaintiffs**, v. **KATHLEEN SEBELIUS**, in her official capacity as Secretary of the United States Department of Health and Human Services, *et al.*, **Defendants**.	Case No. 3:10-cv-01033-DMS-WMC **Memorandum of Points and Authorities in Opposition to Application for a Temporary Restraining Order** No hearing requested

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Introduction

Plaintiffs bring to this Court a request for extraordinary emergency relief, a temporary restraining order ("TRO"), focused primarily on a provision of the Patient Protection and Affordable Care Act ("ACA" or "the Act") that does not become effective *until 2014.* Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), *as amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010). To justify a TRO, plaintiffs must show that they need relief not merely before 2014, but before *July 16, 2010*, when this Court hears their request for a preliminary injunction. *American Trucking Assns., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (setting out standard for preliminary injunctions); *Moncrief v. Washington Mutual, F.A.*, 2010 WL 1407241, at * 1 (S.D. Cal. Apr. 7, 2010) (discussing the purposes of TROs). Plaintiffs make no effort to establish such harm. Instead, they espouse a laxer standard, relying on case law that since been overruled. In place of the requisite showing, plaintiffs ask the Court "to prevent this runaway health care train from getting too far down the track before trying to put on the brakes." (TRO App. at 42.) Empty metaphors and barren assertions, however, do not suffice to demonstrate irreparable harm. *See, e.g., Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1209 (D. Haw. 2006) (unadorned assertion does not establish irreparable harm). That is especially so where the claim of harm from the statute now, nearly four years before the key provision at issue becomes operative, is implausible.

Standing alone, this failure to show irreparable harm between now and July 16 dictates denial of their application. But this flaw does not stand alone. Plaintiffs also cannot demonstrate that they are "likely to prevail on the merits." *American Trucking*, 559 F.3d at 1052. At the threshold, because plaintiffs do not allege facts demonstrating that the provisions they challenge

cause them imminent, concrete, and particularized harm, they lack standing to invoke this Court's jurisdiction. *See United States v. Hays*, 515 U.S. 737, 742-43 (1995). They therefore cannot succeed on the merits.[1] *See, e.g., Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1104 (9th Cir. 2005).

Nor would plaintiffs be likely to succeed even if this Court did have jurisdiction. Among a host of other infirmities, to be discussed at greater length in subsequent briefing, plaintiffs allege that the Act for the first time establishes offices of women's health, when in fact such offices have existed for 19 years. They claim that the Act requires plaintiffs to disclose private information, when the provisions cited either do not exist or instead address grants and insurers' obligations. Further, plaintiffs misread the plain language and legal effect of an Executive Order, revive doctrines discredited since the days of *Lochner v. New York,* 198 U.S. 45 (1905), and up-end decades of jurisprudence under the Commerce and General Welfare Clauses of the Constitution.

Finally, the equities and public interest weigh heavily against a TRO. *American Trucking*, 559 F.3d at 1052 (plaintiffs must show "that the balance of equities tips in [their] favor and that an injunction is in the public interest"). The ACA is an important national legislative reform designed to make health insurance coverage more available and affordable. In enacting the ACA, Congress sought to counter the adverse economic effects and avoid the personal tragedies caused by the current lack of insurance coverage for millions of Americans. The statute was the product of an intense and thorough national debate, and years of careful deliberation by Congress. Yet plaintiffs ask this Court not merely to set aside the democratic

[1] Plaintiffs' lack of standing also defeats any argument that they have suffered irreparable harm. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1998) (explaining that the minimum injury necessary to demonstrate standing does not suffice to establish irreparable harm).

judgment of the elected branches of government, but to do so hurriedly in the six weeks before hearing their motion for a preliminary injunction. Notwithstanding the apparent strength of plaintiffs' convictions, plaintiffs are not entitled to second-guess Congress's legislative assessment of the public interest or to demand that this Court rush to judgment.

For these reasons, as elaborated and supplemented below, plaintiffs have not shown the requisite "clear showing" that would justify the "extraordinary remedy" of injunctive relief, *Winter v. Natural Res. Defense Council*, 129 S. Ct. 365, 375-76 (2008), and thus the Court should deny plaintiffs' application for a TRO.

Background

The record before Congress when it enacted the ACA documented the staggering costs of the broken health care system. According to projections, the United States spent more than 17% of its gross domestic product on health care in 2009. Pub. L. No. 111-148, §§ 1501(a)(2)(B), 10106(a). Notwithstanding this extraordinary expenditure, 45 million people – an estimated 15% of the population – went without health insurance for some portion of 2009, and, absent the new legislation, that number would have climbed to 54 million by 2019. Cong. Budget Office ("CBO"), *Key Issues in Analyzing Major Health Insurance Proposals* 11 (Dec. 2008) [hereinafter *Key Issues*]; *see also* CBO, *The Long-Term Budget Outlook* 21-22 (June 2009). The millions who have no health insurance coverage still receive medical care, but often cannot pay for it. The costs of that uncompensated care – which in large part were preventable – are shifted to the government, taxpayers, insurers, and the insured. But this cost shifting is not the only economic harm imposed by the lack of insurance. *See* Pub. L. No. 111-148, §§ 1501(a)(2)(E), 10106(a) (detailing economic losses, including those attributable to the poorer health and shorter lifespans

of the uninsured). And all of these costs, Congress determined, have a substantial effect on interstate commerce. *Id.* §§ 1501(a)(2)(F), 10106(a).

In order to remedy this enormous economic problem, the Act comprehensively "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." Pub. L. No. 111-148, §§ 1501(a)(2)(A), 10106(a). Of the numerous provisions addressing national health care expenditures, five reforms are particularly central to Congress's efforts. First, to address inflated fees and premiums in the individual and small-business insurance market, Congress fostered competition through health insurance exchanges, "an organized and transparent marketplace for the purchase of health insurance where individuals and employees (phased-in over time) can shop and compare health insurance options." H.R. REP. NO. 111-443, pt. II, at 976 (2010) (internal quotation omitted).

Second, the Act augments the existing system of health insurance, in which most individuals receive coverage as part of their employee compensation. *See* CBO, *Key Issues*, at 4-5. It creates tax incentives for small businesses to purchase health insurance for their employees, and imposes penalties on certain large businesses that do not provide adequate coverage to their employees. Pub. L. No. 111-148, §§ 1421, 1513; Pub. L. No. 111-152, § 1003. By maintaining and expanding workplace-sponsored plans, these provisions moderate the potential surge of enrollees in federally subsidized insurance programs, thus reducing the cost of the Act's reforms. CBO, *Effects of Changes to the Health Insurance System on Labor Markets* 3-4 (2009).

Third, at the same time, the Act subsidizes insurance coverage for a large portion of the population who do not have insurance, through the workplace or otherwise. As Congress understood, nearly two-thirds of the uninsured are in families with income less than 200 percent

of the federal poverty level, H.R. REP. NO. 111-443, pt. II, at 978 (2010); *see also* CBO, *Key Issues*, at 27, while 4 percent of those with income greater than 400 percent of the poverty level are uninsured. CBO, *Key Issues*, at 11. The Act seeks to plug this gap by providing health insurance tax credits and reduced cost-sharing for individuals and families with income between 133 and 400 percent of the federal poverty line, Pub. L. No. 111-148, §§ 1401-02. Beginning in 2014, the Act also extends eligibility for Medicaid to individuals with incomes below 133 percent of the federal poverty level. *Id.* § 2001.

Fourth, the Act removes barriers to insurance coverage. It prohibits widespread insurance industry practices that increase premiums – or deny coverage entirely – to those with the greatest need for health care. Most significantly, the Act bars insurers from refusing to cover individuals with pre-existing medical conditions. Pub. L. No. 111-148, § 1201.[2]

Finally, the Act requires that all Americans, with specified exceptions, maintain a minimum level of health insurance coverage, or pay a penalty. Pub. L. No. 111-148, §§ 1501, 10106.[3] Congress determined that this provision "is an essential part of this larger regulation of economic activity," and that its absence "would undercut Federal regulation of the health insurance market." *Id.* §§1501(a)(2)(H), 10106(a). That judgment rested on a number of Congressional findings. Congress found that, by "significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums." *Id.* §§ 1501(a)(2)(F), 10106(a). Conversely, and of critical importance,

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[2] It also prevents insurers from rescinding coverage for any reason other than fraud or misrepresentation, or declining to renew coverage based on health status. *Id.* §§ 1001, 1201. And it prohibits caps on the amount of coverage available to a policyholder in a given year or over a lifetime. *Id.* §§ 1001, 10101(a).

[3] These provisions have been amended by the Health Care and Education Affordability Reconciliation Act of 2010, Pub. L. No. 111-152, § 1002, 124 Stat. 1029, 1032.

Congress also found that, without the minimum coverage provision, the reforms in the Act, such as the ban on denying coverage based on pre-existing conditions, would not work, as they would amplify existing incentives for individuals to "wait to purchase health insurance until they needed care," thereby further shifting even greater costs onto third parties. *Id.* §§ 1501(a)(2)(I), 10106(a). Congress thus was unequivocal in its judgment that the minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id.*

Argument

I. Plaintiffs Must Make an Extraordinary Showing to Obtain a Temporary Restraining Order.

A temporary restraining order is an extraordinary remedy meant simply to preserve the status quo until a court can rule on a motion for preliminary injunction. *Moncrief*, 2010 WL 1407241, at *1; *see also Winter*, 129 S. Ct. at 376 (describing a preliminary injunction as an "extraordinary remedy"). An applicant for a TRO must satisfy a heavy burden. The plaintiff must establish: (i) that it is likely to suffer irreparable harm in the absence of preliminary relief in the short period before the Court can give the issues more thorough consideration,[4] (ii) that it is likely to succeed on the merits, (iii) that the balance of equities tips in its favor, and (iv) that the injunction is in the public interest. *American Trucking*, 559 F.3d at 1052 (setting out the standard for preliminary injunctions); *Chen v. PMC Bancorp*, 2010 WL 596421, at *3 (S.D. Cal. Feb. 16, 2010) (standards for issuing a TRO and for issuing a preliminary injunction are the same if the non-movant has received notice).

[4] A temporary restraining order lasts only fourteen days, and can be extended only for fourteen more days. Fed. R. Civ. P. 65(b). Thus, any TRO would expire before the hearing on plaintiffs' motion for a preliminary injunction.

Plaintiffs do not attempt to make this four-part showing. Instead, they rely on case law, which has since been overruled, permitting preliminary relief based on the mere possibility of irreparable harm or on the existence of "serious questions" going to the merits. *See, e.g., Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007). In *Winter*, the Supreme Court held that this standard was "too lenient" and that a plaintiff must independently show each of the four elements for preliminary relief. 129 S. Ct. at 375. The Ninth Circuit, therefore, has concluded that "[t]o the extent that our cases have suggested a lesser standard [than that articulated in *Winter*], they are no longer controlling, or even viable." *American Trucking*, 559 F.3d at 1052.

II. Plaintiffs Make No Showing That They Would Be Irreparably Harmed in the Absence of Relief Before the Preliminary Injunction Motion Is Heard.

To obtain a temporary restraining order, plaintiffs must show a likelihood that they will be irreparably harmed if the Court does not issue an injunction before deciding their preliminary injunction motion, which has been set for a July 16 hearing. Plaintiffs fail to show that they will suffer any harm at any time – let alone irreparable harm that will occur within the next six weeks. (TRO App. at 41-42.) Indeed, plaintiffs could not possibly suffer harm from either penalty between now and July 16. Plaintiffs challenge the penalties that the Pacific Justice Institute could accrue for failing to provide minimum insurance coverage to its employees, or that Mr. Baldwin could incur for failing to obtain such coverage. They argue that these penalties are unconstitutional under the Commerce Clause, the Due Process Clause, the Direct Tax Clause, and the Origination Clause. (TRO App. at 13-32.) But neither penalty could possibly apply before the 2014 tax year. *See* Pub. L. No. 111-148, §§ 1501(d), 1513(d).

Similarly, Mr. Baldwin raises an equal protection claim to the ACA's establishment of women's health offices in certain federal agencies. Plaintiff fails to note, however, that the

Office of Women's Health has operated in the Department of Health and Human Services since 1990, in the Health Resources Services Administration since 1991, in the Food and Drug Administration since 1994, and in the Centers for Disease Control and Prevention since 1994,[5] and that the federal government also has funded research on male diseases, including prostate cancer, the one Mr. Baldwin cites**.** National Institutes of Health Website, Research Portfolio Online Reporting Tools (accessed June 4, 2010) (available at http://www.report.nih.gov/rcdc/categories/). These lapses aside, Mr. Baldwin fails to explain how he suffers any injury from the existence of those offices, let alone an injury between now and July 16 that is irreparable. The pleadings likewise fail to explain how plaintiffs will suffer any irreparable harm in the next six weeks if they do not obtain a declaratory judgment as to the meaning of the ACA's community health center provisions and the Executive Order, or if they do not obtain an order directing the Secretary of Health and Human Services to list for a second time the authorities that the Act provides her.

Plaintiffs may not rely on a metaphorical, conjectural, or political harm. They must prove *irreparable* harm absent a temporary restraining order. Because they have not even attempted to do so, their application should be denied.

III. Plaintiffs Are Not Likely to Succeed on the Merits.

Plaintiffs' request for a temporary restraining order fails for a second reason. They are not merely unlikely to succeed with respect to any of their scattershot claims against the constitutionality of the ACA; rather, they are certain to fail. The defendants will discuss the

[5] http://www.womenshealth.gov/owh/about/; http://www.ask.hrsa.gov/listserv_1004.cfm; http://www.fda.gov/AboutFDA/CentersOffices/OC/OfficeofWomensHealth/default.htm; http://www.cdc.gov/women/about/index.htm.

many factual and legal errors in plaintiffs' theories in greater detail in subsequent briefing. The following discussion merely highlights some of the most obvious deficiencies.

A. Plaintiffs Cannot Prevail on Their Claim That Congress Lacks Authority to Enact the ACA.

1. This Court Lacks Jurisdiction to Review This Claim.

Plaintiffs seek to invalidate the ACA on the ground that Congress lacks authority under Article I to require employers such as the Pacific Justice Institute (also "the Institute") to provide health insurance to their employees, or to require individuals such as Mr. Baldwin to obtain such insurance. (TRO App. at 14-23.) They also assert that, because Congress lacks that authority under Article I, the ACA constitutes an unlawful attempt to amend the Constitution. (TRO App. at 32-33.) But neither the Act's tax penalties for certain large employers who fail to provide adequate coverage to their employees, nor the tax penalties for (nonexempt) individuals who fail to obtain coverage, takes effect before 2014. Pub. L. No. 111-148, §§ 1501(d), 1513(d). Plaintiffs fail to show that they will suffer harm prior to the effective date, or even thereafter, and the mere possibility of some unwanted effect in the future is insufficient to allow pursuit of their claim at this time. They thus lack standing to challenge either provision, a constitutional prerequisite to this Court's review.

As the Supreme Court reiterated in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.* at 341 (internal quotation omitted). An actual case or controversy requires a plaintiff with standing, one who can demonstrate that he has suffered a concrete and particularized injury in fact that is traceable to the defendant's conduct and that is likely to be remedied by a favorable

decision from the court. *United States v. Hays*, 515 U.S. 737, 742-43 (1995). A plaintiff who "alleges only an injury at some indefinite future time" has not shown an injury-in-fact, particularly where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 564 n.2 (1992). In such a case, "the injury [must] proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.* These Article III standing requirements constitute the "irreducible constitutional minimum of standing." *Hays*, 515 U.S. at 742.

The plaintiffs' theory of standing seems to be based on their assertion that they are "offended and deeply troubled" by, or that they "do[] not consent to," some provisions of the Act. (*E.g.*, TRO App. at 7.) But a citizen cannot create standing by withholding consent from a law enacted through the democratic process, and "moral outrage, however profoundly and personally felt, does not endow [plaintiffs] with standing to sue." *Smelt v. County of Orange*, 447 F.3d 673, 685 (9th Cir. 2006).

Even ignoring the three-and-a-half year gap until the employer coverage and minimum coverage requirements become effective in 2014, it is "wholly speculative," *Loritz v. U.S. Court of Appeals for the Ninth Circuit*, 382 F.3d 990, 992 (9th Cir. 2004), that those provisions will inflict any cognizable injury on either plaintiff. The Pacific Justice Institute currently provides insurance coverage to its employees. (TRO App. at 10.) It would be a matter of pure speculation – and the Institute, in any event, does not even attempt to allege – that it would cease to provide that coverage by 2014, or that the coverage it would offer would run afoul of the statute or of the regulations yet to be promulgated. Indeed, the Institute does not even allege that it is a large employer which would be covered by the employer coverage requirements when they

take effect. *See* Pub. L. No. 111-148, § 1513. Similarly, Mr. Baldwin does not allege that he is currently uninsured or that he will be so in 2014. He therefore fails to allege that the minimum coverage provision will have any impact on him at all. In addition, whatever Mr. Baldwin's personal situation is now, in 2014, he might qualify for an exemption to the minimum coverage penalty. He might receive assistance through Medicaid or Medicare. Or he might choose to purchase insurance. If he does, given his claim that he "experiences health issues relating to his prostate," (TRO App. at 7), Mr. Baldwin, far from incurring harm, well might benefit from the prohibition in the Act against insurers' refusing to cover, or charging higher premiums to, individuals with preexisting conditions. Pub. L. No. 111-148, § 1201. In sum, any possible injury that the Institute or Mr. Baldwin might suffer in the future is far too speculative to support standing now. *See Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 656 (9th Cir. 2002) (explaining that the mere possibility of a future injury does not support standing).

Further, plaintiffs' challenges to future tax penalties that the Institute or Mr. Baldwin might incur are barred by the Anti-Injunction Act ("AIA"). *See* 26 U.S.C. § 7421(a) ("No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.") Both penalties under the Act are "assessed and collected in the same manner" as other penalties under the Internal Revenue Code, Pub L. No. 111-148, §§ 1501, 1513, and, like these other penalties, fall within the bar of the AIA. 26 U.S.C. § 6671(a); *see, e.g., Barr v. United States*, 736 F.2d 1134, 1135 (7th Cir. 1984). Like any other taxpayers, Mr. Baldwin and the Institute must pursue their challenges to any penalties that might result in 2014 or after through the proper vehicle – a refund suit brought after the penalty is assessed and paid.

2. Congress Plainly Acted Within Its Article I Authority in Enacting the ACA.

Even if the Court could reach the merits of plaintiffs' claims, it is plain that Congress acted well within its Article I authority in enacting the ACA. Contrary to plaintiffs' assertion, Congress's Commerce Clause authority is not limited to the direct regulation of interstate commerce. Congress also may "regulate activities that substantially affect interstate commerce," *Gonzales v. Raich*, 545 U.S. 1, 17 (2005), or that form part of a "larger regulation of economic activity," *id.* at 24 (citation and internal quotation marks omitted). "When Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class." *Id.* at 17 (internal quotation marks omitted).

The ACA regulates activities that substantially affect interstate commerce. In adopting the Act, Congress engaged in comprehensive regulation of the vast, $2.5 trillion, interstate health care market. Pub. L. No. 111-148, § 1501(a)(2)(B). Employers who provide insurance coverage to their employees are participants in that market. Given the existing regulation of employer-sponsored insurance plans through such laws as ERISA, COBRA, and HIPAA, it is at the least anachronistic for plaintiffs to assert that Congress lacks authority under the Commerce Clause to legislate regarding plans offered by employers as part of employee compensation. *See, e.g., United States v. Darby*, 312 U.S. 100, 124 (1941).

The 45 million Americans who lack health insurance also participate in the interstate health care market. CBO, *The Long-Term Budget Outlook* 21-22 (2009). That is, those who forego insurance do not forego care; they still receive medical assistance, even if they cannot pay. CBO, *Key Issues* at 13. The costs of their uncompensated care – $43 billion in 2008 – are passed on to the other participants in the health care market: the federal government, state and

local governments, health care providers, insurers, and the insured population. Pub. L. No. 111-148, §§ 1501(a)(2)(F), 10106(a). The minimum coverage provision thus regulates a quintessentially economic decision – whether to obtain insurance to pay for one's health care needs in advance, or to attempt (often unsuccessfully) to pay out-of-pocket, with the significant risk that one will be unable to pay and will thereby contribute to the shifting of the costs of uncompensated care onto the broader public. Pub. L. No. 111-148, §§ 1501(a)(2)(A), 10106(a). Given the direct and aggregate effects of this cost-shifting on interstate commerce, Congress has authority under the Commerce Clause to regulate it. *Raich*, 545 U.S. at 16-17; *see also Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

The minimum coverage provision is also justified independently under the Commerce Clause as an essential part of the comprehensive regulatory scheme effectuated by the Act. The ACA comprehensively regulates the terms on which coverage is provided in the interstate health insurance market, including the new requirement, effective in 2014, that insurers may not deny coverage to persons with pre-existing conditions. Pub. L. No. 111-148, § 1201. Plaintiffs cannot reasonably contend that these provisions, which directly regulate the content of insurance sold nationwide, are outside the scope of the Commerce Clause power. *See, e.g., United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944). And these new insurance reforms could not function effectively if they were not coupled with the minimum coverage provision. As discussed above, absent a requirement to obtain coverage, many persons would have an incentive to forego insurance, wait until their medical situation becomes dire, and then enter the insurance pool with the knowledge that they cannot be charged more for or denied coverage. This would skew the insurance coverage pool toward the most infirm, dramatically increasing insurance costs and shifting even greater costs onto third parties. Congress thus reasonably

determined the minimum coverage provision to be "essential" to the broader regulatory scheme. Pub. L. No. 111-148, §§ 1501(a)(2)(I), (J), 10106(a). This determination that the minimum coverage provision is critical to the comprehensive regulation of health insurance places the provision within Congress's Commerce Clause authority. *See Raich*, 545 U.S. at 22. It likewise follows that the provision is, at the very least, "reasonably adapted to the end permitted by the Constitution," *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 276 (1981), and is therefore an appropriate application of Congress's authority under the Necessary and Proper Clause of the Constitution. *See United States v. Comstock*, 2010 WL 1946729, at * 7 (U.S. May 17, 2010) ("If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.'") (internal quotation omitted).

Moreover, both penalties (*i.e.*, the penalty for large employers who fail to offer coverage to their employees and the penalty for individuals who are subject to the minimum coverage provision but who fail to obtain insurance) are appropriate exercises of Congress's power to lay taxes and make expenditures for the "general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. That Congress had a regulatory purpose in enacting these provisions – to expand insurance coverage – is beside the point. As plaintiffs concede (TRO App. at 26), the provisions are revenue measures, establishing assessments that are collected with the taxpayer's federal taxes if the taxpayer fails to comply with the requirements to be excused from the penalties. *See United States v. Sanchez*, 340 U.S. 42, 44 (1950) ("It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the

activities taxed."). Both provisions are therefore valid under the General Welfare Clause as well as the Commerce Clause.

B. Mr. Baldwin Cannot Prevail on His Due Process Claim.

Mr. Baldwin alleges that the ACA violates his right to due process, reasoning that he has a fundamental right to avoid insurance coverage. (TRO App. at 23-26.) For the reasons discussed above, it is entirely speculative that Mr. Baldwin will be harmed in 2014 or later by the minimum coverage provision. *See* pp. 10-11, *supra.* Mr. Baldwin thus has no standing to raise this claim. Even if he did, the Anti-Injunction Act would bar his claim to forestall imposition of the tax penalty. *See* p. 11, *supra.*

In any event, his due process claim is entirely lacking in merit. Nothing in the cases that he cites – *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); or *Poe v. Ullman*, 367 U.S. 497 (1961) – purports in any way to establish a due process right to forego insurance coverage and to impose one's health care costs on to the larger population. The fundamental liberty interests that are protected under the Due Process Clause are those that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation omitted). Mr. Baldwin's purported objection to obtaining insurance coverage is a purely economic interest. And the Court long ago overruled the discredited line of authority embodied by *Lochner v. New York,* 198 U.S. 45 (1905), that suggested some fundamental right to avoid

economic regulation. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937); *Nebbia v. New York,* 291 U.S. 502 (1934).[6]

C. Mr. Baldwin Cannot Prevail on His Direct Tax or Origination Clause Claims.

Mr. Baldwin alleges that the penalty in Section 1501 of the Act for a failure to obtain minimum coverage is an invalid tax, either because it is a "direct tax" which must be apportioned among the states by population under Article I, Section 9, or because the taxing measure did not originate in the House of Representatives, as would be required under Article I, Section 7. (TRO App. at 26-31.) Here again, Mr. Baldwin seeks to litigate his potential liability for a tax penalty to which he may or may not be subject in four or more years. For the reasons discussed above, he may not do so.

In any event, Mr. Baldwin's readings of the Direct Tax Clause and the Origination Clause are incorrect. Article I, Section 9 requires "direct taxes" and capitation taxes to be apportioned among the states by population. Only a tax that is imposed on property, "solely by reason of its ownership," is a "direct tax" within the meaning of this clause. *Knowlton v. Moore*, 178 U.S. 41, 81 (1900). A tax imposed on the occurrence of an event has always been understood to be an indirect tax not subject to Article I, Section 9. *United States v. Mfrs. Nat'l Bank of Detroit*, 363 U.S. 194, 197-98 (1960); *Tyler v. United States*, 281 U.S. 497, 502 (1930). The minimum

[6] Mr. Baldwin also challenges provisions that purportedly require him to submit to some unspecified, unwanted medical treatment or that invade physician-patient privileged communications. (TRO App. at 24, 32.) No such provisions exist in the Act. Mr. Baldwin further objects to provisions that purportedly require him to disclose personal information. (TRO App. at 23.) He cites to one section of the Act that does not exist (§ 1441), and the remaining provisions do not deal with a patient's personal information, but instead concern reporting within the medical community of the efficacy of medical procedures. Pub. L. No. 111-148, §§ 1002, 1331, 3015, 3504. He identifies no reason why such reporting raises any constitutional concern.

coverage provision does not tax property, but instead is imposed on an occurrence: the taxpayer's decision not to obtain qualifying insurance coverage.[7] Nor is the minimum coverage provision a capitation tax. Such a tax is one imposed "simply, without regard to property, profession, or any other circumstance," *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.), such as a head tax of a fixed amount on all adults in the country. *Id.* at 177; *see also Veazie Bank v. Fenno*, 75 U.S. 533, 540-44 (1869). In contrast to a capitation tax, potential liability under the minimum coverage provisions turns on multiple circumstances – including whether the taxpayer has obtained qualifying coverage or has sufficient income to be liable – and the amount of the tax generally varies with income. 26 U.S.C. § 5000A. No taxing provision has ever been struck down as a capitation tax, and the penalty imposed by the minimum coverage provision should not be the first.

Mr. Baldwin's claim under the Origination Clause, U.S. CONST., art. I, § 7, is similarly misplaced. Even if one were to assume that the ACA is a "Bill[] for raising Revenue" which would be subject to the Clause, it originated in the House as H.R. 3590, and thus satisfied the Origination Clause. To be sure, the Senate amendments to H.R. 3590 were expansive. Article I, Section 7 provides, however, that "the Senate may propose or concur with Amendments [of bills for raising revenue] as on other Bills." Accordingly, those amendments do not raise Origination Clause concerns. *See Armstrong v. United States*, 759 F.2d 1378, 1381-82 (9th Cir. 1985)

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[7] Mr. Baldwin's reliance on the 90-year old decision in *Eisner v. Macomber*, 252 U.S. 189 (1920), demonstrates how remote his arguments are from current law, and from this case. *Macomber* held that a tax on stock dividends was not an income tax, but rather a property tax, because the taxpayer had not realized any gain, and therefore the tax had to be apportioned. 252 U.S. at 219. As the Ninth Circuit has recognized, the law has long since moved past *Macomber*. *See, e.g.*, *Vukasovich, Inc. v. Comm'r of Internal Rev.*, 790 F.2d 1409, 1414 (9th Cir. 1986) (noting that the Supreme Court now applies a different concept of income). Antiquity aside, there is no sensible argument that the penalty aspect of the minimum coverage provision imposes a property tax.

(holding that the Origination Clause was satisfied where the Senate replaced the "entire text of the House bill except for its enacting clause"); *see also Rainey v. United States*, 232 U.S. 310, 317 (1914).

D. Mr. Baldwin Cannot Prevail on His Claim that the ACA Violates Equal Protection.

Mr. Baldwin claims that the ACA violates the equal protection component of the Fifth Amendment's Due Process Clause by establishing governmental offices to coordinate the promotion of women's health issues, without establishing corresponding offices for men's health issues. (TRO App. at 33-38, citing Pub. L. No. 111-148, § 3509(a)-(g).) The plaintiff lacks standing to raise this claim and, therefore, cannot prevail on the merits for this reason (as well as others to be discussed in subsequent briefing).

Mr. Baldwin identifies no concrete and particularized injury that he has suffered, or will suffer imminently, as a result of the establishment of the women's health offices. Ignoring major government programs focused on diseases afflicting men, he simply speculates that the government will not advance men's health as much as women's. (TRO App. at 37.)[8] "Instead of a particularized injury," Mr. Baldwin is at most "asserting 'generalized grievances more appropriately addressed in the representative branches,' which do not confer standing." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The Supreme Court and Ninth Circuit have repeatedly held that such a

[8] Mr. Baldwin asserts that from 1999-2006 there were 1.5 times as many deaths from prostate cancer as from ovarian and cervical cancers, and he suggests that equal protection requires the ratio of research dollars devoted to these diseases be the same. (TRO App. at 34-35.) In fact, in 2009, the U.S. National Institutes of Health distributed 1.66 times the amount of money for research on prostate cancer as for research on cervical and ovarian cancer research. *See* National Institutes of Health Website, Research Portfolio Online Reporting Tools (accessed June 4, 2010) (available at http://www.report.nih.gov/rcdc/categories/). Under plaintiff's own standard, his harm is not merely speculative. It is nonexistent.

generalized – *i.e.*, widely shared and non-concrete – grievance against allegedly unlawful government conduct fails to support standing. *See, e.g, Allen*, 468 U.S. at 755-56 & n.22; *Arakaki v. Lingle*, 477 F.3d 1048, 1060 (9th Cir. 2007). Importantly, this rule "applies with as much force in the equal protection context as in any other." *Hays*, 515 U.S. at 743.

Mr. Baldwin also cannot trace his harm to the ACA. The five women's health offices about which he complains existed prior to the enactment of the ACA. *See, e.g.*, Pub L. No. 111-148, § 3509(a)(1). The ACA alters the structure of the offices, providing a statutory foundation for some and slightly modifying the organization of others, but that is all. *See* Pub L. No. 111-148, § 3509(a)-(g). Thus, Mr. Baldwin's suggestion that these offices are new is false, and the alleged harm caused to him by the creation of these offices does not flow from the ACA. *See Hays*, 515 U.S. at 742-43. This error precludes standing and casts even greater doubt on plaintiffs' professed need for emergency relief.

E. Plaintiffs Cannot Prevail on Their Claim Regarding the Executive Order.

Plaintiffs contend (i) that there are direct appropriations in the ACA that may be used by community health centers, without limitation, for abortions, and (ii) that Executive Order No. 13,535, 75 Fed. Reg. 15,599 (2010), which ensures the enforcement and implementation of abortion restrictions with respects to the ACA, functions as an unconstitutional line-item veto, akin to the law struck down in *Clinton v. New York*, 524 U.S. 417 (1998). (TRO App. at 38-39.) Specifically with respect to the line-item veto allegation, plaintiffs claim that the Executive Order excises direct appropriations made to community health centers, in order to prevent the money from being used for abortions. (TRO App. at 38-39.)

Both contentions are incorrect – community health centers may not use direct appropriations for abortions without limitation, and the Executive Order does not "veto"

anything at all. The order confirms that existing, congressionally authorized regulations, which set conditions for the expenditure of grant money by community health centers, apply to funds appropriated by the ACA. *See* Order § 3. These regulations do not allow community health centers to use federal funds to provide abortion services, except in limited circumstances. *Id.* Plaintiffs' line-item veto claim is thus entirely meritless.[9] *Id.*

Moreover, plaintiffs do not have standing to advance their meritless claim: plaintiffs fail to identify a concrete and particularized injury that they will suffer as a result of the appropriations or the supposed line-item veto. *See Hays*, 515 U.S. at 742-43. Their claim with respect to the appropriation is a mere generalized grievance, devoid of any hint of concrete harm. *Newdow*, 597 F.3d at 1016. At all events, federal law already imposes restrictions on the funding of abortions by community health centers, rendering even this abstract grievance illusory. *See* Order § 3. And their claim regarding the alleged line-item veto fares no better. Unlike the plaintiffs in *New York*, 524 U.S. at 430-33, plaintiffs here do not allege that they will benefit from the appropriations that supposedly will be vetoed.[10] To the contrary, plaintiffs' motion states that they "are pro-life and object to the [ACA's purported] use of directly appropriated public funds for abortion." (TRO App. at 39). If anything, the Executive Order advances that objective. Plaintiffs ignore this incongruity. They focus instead on their abstract objection to the

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[9] Moreover, plaintiffs cannot identify a cause of action that would allow them to challenge the executive order. Section 4(c) of the Order, for example, states that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law against the United States, its departments, agencies, entities, officers, employees or agents, or any other person."

[10] In addition, because these ostensible vetoes cover appropriations for future years, plaintiffs' claims are speculative and unripe. *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (quotation marks omitted from parenthetical).

Executive Order as an unconstitutional line-item veto. (TRO App. at 38-39.) Such an abstract interest does not establish an injury sufficient to confer standing. *See, e.g.*, *Valley Forge Christian Coll. v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 482 (1982).[11]

F. Plaintiffs Cannot Prevail on Their Section 1552 Claim.

Plaintiffs maintain that Secretary Sebelius has failed to publish on the internet a "list of all of the authorities" provided to her by the ACA, as required by the Act. (TRO App. at 39, citing Pub. L. No. 111-148, § 1552). The Secretary has, in fact, satisfied the publication requirement. *See* Health Reform and the Department of Health and Human Services, HHS Website (available at http://www.healthreform.gov/health_reform_and_hhs.html) (accessed on June 4, 2010). But the Court need not address that issue, nor need it solve the mystery as to what cause of action plaintiffs assert and its source. For, once again, plaintiffs fail to demonstrate standing to sue. They do not identify how they have been injured in a concrete and particular way by the Secretary's alleged failure to outline in a manner they deem suitable the powers accorded her by the Act. *See Hays*, 515 U.S. at 742-43. They do not specify what purpose a longer explanation would serve for them, or how they are differently situated from everyone else who might visit the website. *See Becker v. FEC*, 230 F.3d 381, 389-90 (1st Cir. 2000) (explaining that, as a general matter, parties seeking information must explain the need for the

[11] Nor do plaintiffs identify any need for emergency relief prior to the Court deciding their motion for a preliminary injunction. The earliest of the allegedly excised appropriations is for fiscal year 2011. *See* Pub. L. No. 111-148, § 10503; Pub. L. No. 111-152, § 2303. The federal government's fiscal year 2011 begins on October 1, 2010, about two and a half months after the hearing date for plaintiffs' motion for a preliminary injunction. *See Huntington Hosp. v. Thompson*, 319 F.3d 74, 79 (2d Cir. 2003) (explaining that the federal government's fiscal year begins on October 1). Accordingly, the Court will have plenty of time to consider this claim in the context of plaintiffs' motion for a preliminary injunction and, therefore, it need not enter a TRO to preserve the status quo. *Moncrief*, 2010 WL 1407241, at *1.

information to have standing to seek it). Thus, rather than identifying government conduct that harms a concrete interest, plaintiffs again air an abstract grievance about perceived inadequacies in the government's operation. Plaintiffs cannot, however, invoke this Court's jurisdiction to propagate their views about how the government should function. *Valley Forge*, 454 U.S. at 482.[12]

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Because plaintiffs lack standing to raise any of their claims, they necessarily cannot demonstrate any likelihood of prevailing on the merits or of suffering irreparable harm. *Ranchers Cattlemen*, 415 F.3d at 1104 (concluding that a party without standing cannot show it was likely to succeed on the merits); *Caribbean Marine Servs. Co.*, 844 F.2d at 674.

IV. The Balance of the Equities and the Public Interest Weigh Strongly Against Granting Preliminary Relief.

Plaintiffs cannot establish that either the balance of equities or the public interest weighs in their favor. The Supreme Court has cautioned that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). "The public interest may be declared in the form of a statute." *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) (internal quotation omitted). Where the elected branches have enacted a statute based on their understanding of what the public interest requires, this Court's "consideration of the public interest is constrained . . . for the responsible public officials . . . have already considered that interest." *Id.* at 1126-27. Indeed, "a court sitting in equity cannot

[12] Relatedly, plaintiffs fail to explain, as they must, how they will be irreparably harmed if the Secretary does not provide a more refined or fulsome explanation in the short period before this Court will have an opportunity to rule on plaintiffs' motion for a preliminary injunction. *See American Trucking*, 559 F.3d at 1052.

ignore the judgment of Congress, deliberately expressed in legislation." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (internal quotation omitted).

When it enacted the ACA, Congress determined that the Act would reduce the costs attributable to the poorer health and shorter life spans of the uninsured, lower health insurance premiums, improve financial security for families, and decrease the administrative costs of health care. Pub. L. No. 111-148, §§ 1501(a), 10106(a). Congress also determined that the minimum coverage provision is "essential" to achieving these results. *Id.* As millions of Americans struggle without health insurance, as medical expenses force them into personal bankruptcy, as the spiraling cost of health care encumbers the entire economy, it is not for plaintiffs to second-guess these legislative judgments as to what the public interest requires.

Conclusion

The application for a temporary restraining order should be denied.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on June 4, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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