**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

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| STATE OF FLORIDA, by and through BILL McCOLLUM, *et al.*, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 3:10-cv-91-RV/EMT |
| UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, | ) | |
| Defendants. | ) | |

**REPLY IN SUPPORT OF**
**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## ARGUMENT

## I. THE MINIMUM COVERAGE PROVISION IS CONSTITUTIONAL

In the Patient Protection and Affordable Care Act ("ACA"), Congress addressed critical problems in the $2.5 trillion interstate health care market and the $854 billion health insurance market that it encompasses. ACA §§ 1501(a)(2)(B), 10106(a). As part of its regulation of these markets, the ACA requires consumers to obtain a minimum level of health insurance coverage. Congress expressly found that this "requirement regulates activity that is commercial and economic in nature — economic and financial decisions about how and when health care is paid for, and when insurance is purchased." *Id.* §§ 1501(a)(2)(A) , 10106(a). Those who "choos[e] to forgo insurance . . . are making an economic decision to try to pay for health care services later, out of pocket, rather than now through the purchase of insurance." *Thomas More Law Ctr. v. Obama*, No. 10-11156, 2010 WL 3952805, at *9 (E.D. Mich. Oct. 7, 2010).

For more than 70 years, the Supreme Court has recognized congressional authority under the Commerce Clause to address conduct that substantially affects interstate commerce. *E.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Here, Congress specifically found that economic decisions about how to pay for health care in the aggregate shift tens of billions of dollars of health care costs each year, from the uninsured, who frequently are unable to pay for the medical services they receive, onto other participants in the health care market. ACA §§ 1501(a)(2)(F), 10106(a). That, as Congress found, is a substantial effect on interstate commerce. *Id.* §§ 1501 (a)(1), (2)(F), 10106(a). It takes no "metaphysical gymnastics," but rather a straightforward application of the long-accepted constitutional standard to determine that Congress has the power to regulate this economic activity. *Thomas More*, 2010 WL 3952805, at *9; *accord Liberty Univ. v. Geithner*, No. 10-15, 2010 WL 4860299, at *14-15 (W.D. Va. Nov. 30, 2010).

Any assessment of plaintiffs' challenge to this regulation must consider it in context, with other key reforms in the ACA that it enables. In particular, Congress in the ACA undertook to regulate the terms of health insurance policies, as it has regulated many other financial products sold in interstate commerce, to protect millions of Americans who otherwise could not obtain insurance coverage. The ACA thus requires that insurance companies offer policies even to those who have pre-existing conditions, and prohibits discrimination, such as charging higher rates, against people with pre-existing conditions. *Id.* § 1201. Congress adopted the minimum coverage provision challenged by plaintiffs because, as the congressional finding expressly affirms, the provision "is essential" to those reforms, "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.* § 1501(a)(2)(I). Under the straightforward test set forth in *Raich*, 545 U.S. at 26-27, the minimum coverage provision falls within Congress's commerce powers because it is an "essential part of the larger regulatory scheme."

Plaintiffs downplay the established tests of Congress's authority under the Commerce Clause and import a new standard that would bar Congress from imposing requirements on citizens who are not already actively engaged in commerce. This categorical prohibition applies, plaintiffs contend, even if the economic decisions Congress regulates substantially affect interstate commerce, and even if the regulation is necessary to effectuate reforms that are authorized under the Commerce Clause. Aside from wrongly deeming the uninsured "inactive," plaintiffs' approach revives the type of categorical demarcation of Congress's commerce powers that the Supreme Court abandoned in the 1930s, and in so doing, invents an exclusion that appears nowhere in Commerce Clause jurisprudence. No case — ever — has imposed such a limitation on Congress's power to ameliorate substantial adverse effects on interstate commerce.

And *Raich* pronounces no "inactivity" exception to Congress's authority to adopt measures that are essential to reforms within its commerce powers. In essence, plaintiffs' new test has little to do with the scope of the Commerce Clause, but instead seeks to vindicate their due process claim, previously rejected by this Court, that the ACA impairs the freedom "to eschew entering into a contract." Slip op. at 59 (Oct. 14, 2010) [Doc. No. 79]. This claim, however, is no more valid when repackaged as a challenge to Congress's power under the Commerce Clause than it was when lodged under the Due Process Clause.

**A. The Minimum Coverage Provision Regulates Economic Activity**

Plaintiffs concede that "[t]he purchase of health care services" is "actual commerce." Pls.' Mem. in Opp'n to Defs.' Mot. for Summ. J. ("Pls.' Opp'n") 8. After pausing to argue that such purchases are "typically . . . local and intrastate" (notwithstanding striking counter-examples provided in the *amicus* brief of four of the plaintiff states' own governors[1]), plaintiffs also concede, as they must, that Congress may regulate such commercial transactions. *Id*. at 8 & n.2; *see, e.g.*, *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 329 (1991) (although hospital's "primary activity is the provision of health care services in a local market, it also engages in interstate commerce").

Plaintiffs also seem to concede, or at least not to contest, what Congress understood — that participation in the market for health care services is virtually universal. *See* Pls.' Opp'n 20-21. "[N]early everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury or require care." *Liberty*, 2010 WL 4860299, at *15; *accord Thomas More*, 2010 WL 3952805, at *9. No

[1] *See* Br. of Governors of Washington, Pennsylvania, Colorado, and Michigan as *Amici Curiae* 9 [Doc. No. 133] (Harborview Medical Center in Seattle had more than 12,000 out-of-state customers in 2009 alone).

plaintiff here suggests that he or she is the cloistered exception who can confidently forswear any future need to purchase medical services. The ACA thus satisfies the Supreme Court's test of regulating activities that have substantial effects on interstate commerce.

Plaintiffs' argument to the contrary incorrectly assumes the existence of some hermetic seal between the health care market — where they concede (or at least do not contest) the existence of regulable "activity" — and the health insurance market, which they say is "another type of commerce." Pls.' Opp'n 7. This newly minted assumption then propels plaintiffs' argument that, no matter how strong the need or how solid the authority Congress may have to regulate activities that substantially affect interstate commerce in the *health care services market*, it cannot also regulate the *health insurance market* unless it can separately point to "activity," not just by tens of millions of participants in that second market, but by every person subject to the regulation. *Id*. at 7-8, 22-23.

The health care and health insurance markets are much more closely related than plaintiffs presuppose. To be sure, those markets are not identical, and they need not be to permit Congress — without undertaking "Orwellian efforts" at "redef[inition]" (*id.* at 10) or constructing some attenuated "daisy-chain" (*id*. at 8) — to recognize in its regulatory scheme how intertwined these markets are. Most who have sought medical care at a doctor's office or hospital have experienced those interrelationships firsthand, as the discussion of insurance generally precedes, influences, and often determines the course of treatment. As the economic scholars explain in their *amicus* brief, "[g]iven the extremely high costs of health care for all but the most routine of treatments, the cost of medical care is beyond the means of all but the very most wealthy Americans," so "[i]nsurance is the means by which we pay for" such health care, a "mechanism for spreading the costs of that medical care across people or over time." Br. of

Economic Scholars as *Amici Curiae* 3, 9 [Doc. No. 125]. Plaintiffs note that health care may be purchased on a "pay-as-you-go basis" in addition to through insurance. Pls.' Opp'n 8. But, as plaintiffs later acknowledge, when the "go" part of this equation transpires, the option of paying through "insurance" is long gone. *Id.* at 22. As the economic scholars explained, "pay-as-you-go" thus may well mean "default-as-you-go," given the potentially catastrophic health costs that serious injury or illness entail. *See* Br. Econ. Scholars at 6-8. In short, while health insurance is not the only way to pay for health care services, it is an essential mechanism for the health care market to function. Thus, it is simple "market reality" that "[h]ow participants in the health care services market pay for such services has a documented impact on interstate commerce." *Thomas More*, 2010 WL 3952805, at *9.

The first two courts to have decided the constitutionality of the minimum coverage provision under the Commerce Clause have both recognized that this close linkage of health care and health insurance confounds plaintiffs' claim that the ACA regulates in the absence of pre-existing activity: "The "fundamental need for health care and the necessity of paying for such services received" creates the market in health care services, of which nearly everyone is a participant. Regardless of whether one relies on an insurance policy, one's savings, or the backstop of free or reduced-cost emergency room services, one has made a choice regarding the method of payment for health care services one expects to receive." *Liberty*, 2010 WL 4860299, at *15 (quoting *Thomas More*, 2010 WL 3952805, at *9). As those courts both concluded, "[f]ar from 'inactivity,' by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance." *Id.*; *accord Thomas More*, 2010 WL 3952805, at *8-9. And, as Congress observed, ACA §§ 1501(a)(2)(F), 10106(a), that economic choice is often unavailing and leads to

uncompensated care, the costs of which are borne by others. *Liberty*, 2010 WL 4860299, at *14; *Thomas More*, 2010 WL 3952805, at *9.

Even if the health insurance market somehow were considered as wholly apart from the health care services market to which it is essential, plaintiffs could not show that everyone affected by the minimum coverage provision is "inactive."[2] Plaintiffs' argument is static, relying on freeze-framed stills that do not capture the activity of dynamic markets. Even before the ACA, a substantial majority of those without insurance coverage at some point during any given year had moved in or out of coverage during that same year. CBO, *How Many Lack Health Insurance and For How Long?* at 4, 9 (May 2003), *available at* www.cbo.gov/doc.cfm?index=4210&type=1 (all Internet addresses last visited Dec. 6, 2010); *see also* CBO, *Key Issues in Analyzing Major Health Insurance Proposals* 11 (Dec. 2008) (Defs.' Ex. 2). Buying or dropping insurance, not to mention procuring medical services, qualifies as "activity" under plaintiffs' own theory. And it is activity that substantially affects interstate commerce, by, among other things, raising the premiums for other insureds. The existence of such substantial effects remains the touchstone of Congress's commerce powers. The ACA satisfies that test.

**B. Where Necessary and Proper to the Exercise of an Enumerated Power, the United States May Require The Purchase of Insurance**

There is no need for the Court to decide whether Congress can regulate "inactivity" because the minimum coverage requirement regulates activity. Plaintiffs' argument that Congress is categorically forbidden from compelling "activity" from otherwise "inactive"

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[2] Defendants do not suggest that any person affected by the provision is properly understood to be inactive. But, in this facial challenge, the burden is plaintiffs to show that "no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), so no inquiry beyond whether some people affected by the provision are active is required.

citizens no matter how necessary it may be to an overall regulation of interstate commerce is, in any event, mistaken. That argument confuses two different senses or types of "power."

It is well established that "where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every *power* needed to make that regulation effective.'" *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)) (emphasis added). The point is not merely that Congress, in carrying out its Commerce Clause power, may call upon its other enumerated powers, for example, its powers to grant letters of marque or establish post offices. Rather the point is, as the Court explained in *M'Culloch v. Maryland*, 17 U.S. 316, 405-23 (1819), that in order to exercise its enumerated powers, the federal sovereign is vested under the Necessary and Proper Clause with the ordinary "means," or powers, of execution.[3]

The power not merely to regulate what citizens do once they act but to compel action in the first instance is one of these ordinary means. And in fact, plaintiffs do not dispute that Congress has the power under the Commerce Clause to require individuals to act. Congress required motels in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), to serve African-American customers. It required the farmer in *Wickard v. Filburn*, 317 U.S. 111, 129 (1942), to buy wheat for his own use rather than grow it all himself. It requires that owners of commercial buildings ensure access by the disabled, 42 U.S.C. §§ 12181-82, and it requires insurers to offer employees a degree of portability for coverage offered through the workplace,

[3] Plaintiffs do briefly acknowledge the Necessary and Proper Clause's "adjunct or incidental" authority for carrying into execution the enumerated powers, Pls.' Opp'n 6, but this concept plays no role in plaintiffs' discussion of the Necessary and Proper Clause, *see id.* at 18-21, in which plaintiffs confuse the instrumental power of ordering citizens to act with the substantive police power, *id.* at 18-19.

29 U.S.C. § 1161.[4] What plaintiffs appear to dispute is Congress's power to require individuals to act in the absence of "pre-existing activity." To be sure, "pre-existing activity" is not a prerequsite for any congressional action. Congress can and does regulate under the Commerce Clause absent pre-existing activity, for example, by prohibiting certain conduct, to prevent activity from occurring, or by adopting environmental regulations, limiting certain types of research, or seeking to revive a market that has become moribund. Plaintiffs' claim thus boils down to the assertion that when Congress regulates in the absence of pre-existing economic activity, it cannot use regulatory tools available in other contexts. No case has ever imposed such a limitation on Congress's choice of means under the Necessary and Proper Clause, and there is no principled basis for imposing it now.

The eminent domain cases illustrate why such a limit is incompatible with the jurisprudence regarding the Necessary and Proper Clause. Eminent domain is not itself an enumerated power. *E.g.*, *Kelo v. City of New London*, 545 U.S. 469, 511 (2005) (Thomas, J., dissenting). It is, however, a power that pertains to the United States as sovereign and is thus one of the means or "agencies for exerting [the enumerated powers] which are appropriate or necessary, and which are not forbidden by the law of its being." *Kohl v. United States*, 91 U.S. 367, 372 (1875). And Congress can exercise the power of eminent domain where necessary and proper to effectuate an enumerated power, without regard to whether the property owner is engaged in economic activity.

Plaintiffs try unsuccessfully to distinguish eminent domain cases on another point. They

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[4] Plaintiffs are thus wrong in claiming that *Jacobson v. Masschusetts*, 197 U.S. 11, 25 (1905), deemed the ability to compel conduct the defining attribute of the police power. Pls.' Opp'n 15 n.9. That discussion of the police power pertained to the subject of regulation, not the means that are necessary and proper to effectuate it.

argue that eminent domain is not an example of compelled activity in the Commerce Clause context because “forced sale” is a “euphemistic[]” way of referring to what is actually a “taking.” Pls.’ Opp’n 17 n.12. There is no euphemism in “forced,” and “forced sale” is at least as accurate a description as “taking” (which does not capture the compensatory part of the transaction as “sale” does).[5]

In sum, where, as here, the *subject* of the regulatory scheme is interstate commerce (the health care and health insurance markets), plaintiffs can invoke neither precedent nor logic to support their effort to rule out a category of regulatory tools available to Congress under the Necessary and Proper Clause to make its regulatory scheme effective.

### C. The Minimum Coverage Provision Is a Necessary and Proper Means to Achieve the Reforms of the Health Insurance Market

As defendants explained in their opening brief, the minimum coverage provision is essential to the insurance industry reforms that ban denying coverage or charging more based on pre-existing conditions. Mem. in Supp. of Defs.’ Mot. for Summ. J. (“Defs.’ SJ Mem.”) 19-22 [Doc. No. 82-1]. Plaintiffs deny that the minimum coverage provision was intended to serve that purpose. Pls.’ Opp’n 19-21. Congress, however, plainly stated that intended purpose:

> Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. *The [minimum coverage] requirement is essential to creating effective health insurance markets in which improved*

[5] Plaintiffs also argue that it is “the land, and not the landowner” that is the subject of the government’s regulation. *Id.* But one might as well argue that it is the premiums and the insurance policies, not the insureds, that are regulated here (by contrast, in some other examples of compelled activity, like posse or jury service, nothing but personal service will do). While there are differences between land and fungible money or contracts, they do not support the bright-line constitutional distinction plaintiffs attempt to create.

> *health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.*

ACA §§ 1501(a)(2)(I), 10106(a) (emphasis added).[6]

Plaintiffs argue that even without a minimum coverage provision, the guaranteed issue and community rating reforms "still could be implemented in some fashion as effective commercial regulations." Pls.' Opp'n 20-21. Plaintiffs do not explain how this could be done. Several states have already tried that route, and those attempts failed. *See* Defs.' SJ Mem. 21 n.7. Plaintiffs' bare hope cannot trump a specific congressional finding that the minimum coverage provision was essential to these reforms, a finding that merits substantial deference from this Court.

In any event, even if there were some other, or even better, way of achieving the objective of health insurance reforms, Congress would be entitled to choose which means to use: "Where various systems might be adopted for [a] purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution." *United States v. Fisher*, 6 U.S. 358, 396 (1805); *accord, e.g.*, *M'Culloch*, 17 U.S. at 413-14 ("To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable"). The means need only be "rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010).

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[6] The President likewise explained that the Act would allow everyone to have "some basic security when it comes to their health care." Pls.' Opp'n 20 (quoting Remarks by the President at Signing of the Health Insurance Reform Bill (Mar. 23, 2010), *available at* http://www.whitehouse.gov/the-pressoffice/remarks-president-and-vice-president-signing-health-insurance-reform-bill).

It need not be the only possible way to implement that power.

Plaintiffs also argue that to "[u]phold" the minimum coverage provision "as 'essential' to the ACA's insurance regulations would license Congress . . . to create and expand its own regulatory power through the simple expedient of legislating in such a manner as to create its own 'necessity.'" Pls.' Opp'n 21. The predicate for invoking, and thus the inherent limitation on, the Necessary and Proper Clause is that Congress must be effectuating an enumerated power. If the appropriate invocation of that power necessitates use of particular means, that is what the Necessary and Proper Clause authorizes. If Congress "create[d] its own 'necessity'" here (as plaintiffs use the phrase) then it did so as well in *Wickard* by adopting a purpose of stimulating higher wheat prices, 317 U.S. at 129, and in *Raich* by choosing to ban interstate commerce in marijuana, 545 U.S. at 13-15. The desirability or wisdom of Congress's goals can be open to dispute, and opponents can pursue — and indeed in this case are pursuing — their own legislative alternatives. But the issue in this judicial forum relates to constitutional authority, not policy preference. Where Congress seeks a purpose within its enumerated powers — and not even plaintiffs dispute that the guaranteed issue and community rating insurance reforms satisfy that test — then Congress may choose means necessary and proper to achieve those reforms. Plaintiffs' notion that Congress in so doing somehow "create[d] its own 'necessity'" cannot be reconciled with the principles the Court has applied since *McCulloch v. Maryland*.

**D. Plaintiffs' Proposed Activity-Inactivity Distinction Does Not Supply Appropriate Limiting Principles for Application of the Commerce Power**

Defendants' argument recognizes and respects the principle that the Commerce Clause *not* expand to "embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what

is national and what is local." *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 37 (1937). "[I]n the nature of things," the operative limitations often "cannot be" captured in "precise formulations." *United States v. Lopez*, 514 U.S. 549, 567 (1995), or rigid categories.

Plaintiffs propose a precise formulation, a categorical rule against using any means of regulating interstate commerce that includes compelling action from those not already in the same narrowly defined slice of the market Congress is regulating.[7] They again imagine all manner of hypothetical laws that supposedly could be adopted to govern other markets. But comparing surgery to orange juice is not particularly apt. Pls.' Opp'n 10-12. As defendants explained in opposing plaintiffs' motion for summary judgment, the failure to purchase health insurance imposes substantial effects on interstate commerce because of the unique combination of features that characterize the health care and health insurance markets — a combination that is present in *no* other market, including other necessity markets. *See* Defs.' Opp'n to Pls.' Mot. for Summ. J. ("Defs.' Opp'n") 8-9 [Doc. No. 137].

Fundamentally, the Supreme Court's standard allowing regulation under the Commerce Clause to address substantial effects on interstate commerce is a means of distinguishing between what is local and what is national. That distinction reflects the core function of the Commerce Clause in empowering Congress to regulate *interstate* commerce. Plaintiffs' overlay, differentiating between what is active and inactive, passes this distinction in the night. The problems Congress addressed in the ACA are not local. As Congress correctly found, the health care and health insurance markets extend — deeply — into the national economy as well. The

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[7] As explained in defendants' opening brief, prior Commerce Clause cases had no need to refer to anything beyond activity, so while they addressed distinctions between *economic* and *non-economic* activity, they did not reach or even address the distinction proposed by plaintiffs. Defs.' SJ Mem. 31-32. (Of course, as explained above, and in defendants' prior briefs, there is economic activity here, so there is likewise no reason to reach the question in this case.)

minimum coverage provision, a quintessential economic regulation, addresses substantial effects that are national in scope, and that operate on a vast interstate market.

## II. THE AMENDMENTS TO MEDICAID FALL WITHIN THE SPENDING POWER

Plaintiffs' opposition marks a remarkable about-face in their coercion theory. They previously claimed that the Medicaid amendments are coercive because they are not *fully* funded by the federal government, and thus place fiscal burdens on already-strained state budgets. *See, e.g.*, Am. Compl. ¶¶ 47, 84; Pls.' Opp'n to Defs.' Mot. to Dism. 3, 48 [Doc. No. 68]; Pls.' SJ Mem. 2, 25. Now, they concede that the ACA's net cost to the states is legally irrelevant, Pls.' Opp'n 29, and instead argue that the amendments are coercive because they offer states *too much* federal funding:

> If anything, enhanced federal funding underscores the ever-increasing power that the ACA exerts over the States: the more the federal government spends, the more it taxes resources away from residents and businesses of the States; the greater the diversion of local resources to Washington, D.C., the greater the States' need for subsidies from the federal government; and the greater the States' need for subsidies, the stronger the federal government's position to dictate coercive and arbitrary conditions which the States must accept.

*Id.* at 28. This latest stop in plaintiffs' search for a coherent legal theory is less an assertion of coercion than it is a wholesale attack on Congress's authority to tax and spend for the general welfare — a power on which the Constitution places no dollar limit. In any event, plaintiffs' doomsday predictions lack empirical support. In fact, the CBO determined that the ACA would reduce the deficit. And even if the federal tax burden were relevant here — and it is not — federal tax revenues, as a percentage of gross domestic product, have remained essentially static for the last 60 years.[8]

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[8] *See, e.g.*, W. Kurt Hauser, *There's No Escaping Hauser's Law*, Wall St. J., Nov. 26, 2010 (federal tax revenues have hovered around 19 percent of GDP since the early 1950s), *available at* http://online.wsj.com/article/SB10001424052748703514904575602943209741952

More to the point, plaintiffs' new spin on the coercion theory would require the Court to accept the backward proposition that the *more* federal funding Congress provides — here, between 90 and 100 percent of expenditures for the newly Medicaid-eligible — the *less* able it is to impose conditions on how that money is spent. That cannot be.

**A. The Medicaid Expansion Will Help, Not Harm, State Budgets**

Before launching into an extended discussion about the ACA's supposed effect on their budgets, the plaintiffs offer a startling concession. Despite their prior claims to the contrary, plaintiffs now say that whether the ACA actually costs or saves the states money is "legally irrelevant" to their coercion claim. Pls.' Opp'n 29; *see also id.* at 41-42. Defendants agree, though perhaps for a different reason: Whether a conditional spending program would require a state to increase net expenditures may affect that state's decision to participate. But that issue is not material to whether the program is a permissible exercise of the spending power. Regardless, a state is free to accept the federal funding and the attached conditions, or not.

The parties' apparent agreement on this point renders further discussion of the subject unnecessary. Nevertheless, given plaintiffs' hyperbolic contention that the ACA will "run State budgets off the proverbial cliff," Pls.' Opp'n 33, and their continued overstatement of potential costs, failure to account for likely savings, and myriad other errors, a brief response is warranted.[9]

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.html; CEA, *Economic Report of the President*, at 424 tbl.B-79 (Feb. 2010) (listing federal receipts, as a percentage of gross domestic product, for fiscal years 1937-2011), *available at* http://www.whitehouse.gov/sites/default/files/microsites/economic-report-president.pdf.

[9] Plaintiffs' response to defendants' statement of facts [Doc. No. 136] is rife with inaccuracies, which space constraints preclude defendants from fully refuting here. While defendants highlight some of the more significant ones here, these are but the tip of the iceberg.

To begin, plaintiffs' claim that it is "preposterous" that the ACA could actually *save* states money, Pls.' Opp'n 41, is refuted by one of their own. Plaintiff Pennsylvania projects that the Act will save the state between $283 and $651 million through 2018. Press Release, Penn. Office of the Governor, *Governor Rendell Signs Order Starting to Implement Health Care Reforms* (May 19, 2010), *available at* http://www.governor.state.pa.us/portal/server.pt/community/news_and_media/2999/news_releases/665417.[10]

Plaintiffs focus their fire on a single study by the Council of Economic Advisers, which found that the savings from just two areas — the elimination of duplicative state programs, and the reduction in the "hidden tax" on premiums — were estimated at $11 billion *per year* after 2013. Plaintiffs argue that this report is not credible for a variety of unpersuasive reasons.[11] But while quibbling about precise dollar amounts, plaintiffs do not dispute that, in general, the states' projections ignore such savings entirely. Nor do plaintiffs raise a serious challenge to the independent analyses that predict similar savings. *See* Defs.' SJ Mem. 41 n.12 (citing, *e.g.*, John

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[10] Likewise, Maryland estimates a savings of $621 million to $1 billion through 2020. Md. Health Care Reform Coord. Coun., Interim Report, Appendix F, at 23 (July 26, 2010), *available at* http://www.healthreform.maryland.gov/interimreport.html.

[11] For example, plaintiffs contend that the CEA report is flawed because it credits states with savings that will actually accrue to local governments. Pls.' Opp'n 38-39. But plaintiffs neglect to mention that states finance a significant percentage of local expenditures on public health, and thus benefit from savings at the local level. For example, a 2008 study of all 67 local health departments in Florida found that 40 percent of their revenue comes from the state. *See* Nat'l Ass'n of County and City Health Officials, *2008 National Profile of Local Health Departments*, at 21 fig.3.8 (2009), *available at* http://www.naccho.org/topics/infrastructure/profile/resources/ 2008report/upload/NACCHO_2008_ProfileReport_post-to-website-2.pdf. Because of this relationship, local savings mean state savings. In addition, plaintiffs assert that the CEA report includes savings from CHIP that some states have already accounted for. Pls.' Opp'n 39. In fact, while the CEA report mentions that "further savings may come" from CHIP, it expressly "does not include savings on CHIP in the bottom line calculations of net savings." CEA, *The Impact of Health Insurance Reform on State and Local Governments*, at 7-8 (Sept. 15, 2009) (Defs.' Ex. 33).

Holahan & Stan Dorn, Urban Institute, *What Is the Impact of the [ACA] on the States?*, at 2 (June 2010) ("[S]tate and local governments would save approximately $70-80 billion over the 2014-2019 period by shifting" current spending "on either state-funded health coverage or uncompen-sated care" into "federally matched Medicaid, clearly exceeding the new cost to states of the Medicaid expansion.").[12]

In addition, plaintiffs repeatedly assert that defendants' projections are misleading because they overlook the effect of ACA § 2304, *see* Pls.' Opp'n 29, 40, 41, which they characterize as imposing a "new requirement that the States (but not the federal government) be responsible for the *provision* of health care services," and which they speculate "*could* lead to tremendous costs for the states," *id.* 29 (second emphasis added). But plaintiffs have conceded that Section 2304 is "unclear in its import and effect, and thus not amenable to cost projections." Pls.' SJ Mem. 42 n.42; *see also id.* Ex. 16 at 2 ¶ 4, 4 ¶ 6 (Nevada) (impact "unclear" and "cannot be assessed until regulations are promulgated" by CMS).[13]

Plaintiffs compound the flaws in their argument by repeating significant errors that defendants have previously noted. For one, they again assert that the ACA requires states to relinquish additional drug rebates they had negotiated with manufacturers. Pls.' Opp'n 41. In fact, the federal government will recapture only the amount by which rebates exceed the levels set under prior law; thus, states that were receiving additional rebates before the ACA will

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[12] Plaintiffs incorrectly assert that the Holahan & Dorn study does not explain its data sources and overestimates savings because the ACA will not totally eliminate uncompensated care. Pls.' Resp. to Defs.' Stmt. of Facts ¶ 57. In fact, that study explicitly cites the study that was its data source, and explains that it adjusted those data to account for "expected health cost growth" and, moreover, "assum[ed] that states could save *just half* of the cost" of spending on such care. Holahan & Dorn, *supra*, at 2 (emphasis added).

[13] Thus, as defendants have explained, plaintiffs lack standing to challenge ACA § 2304 (and any such challenge is unripe). *See* Defs.' Opp'n 21 n.14.

continue to keep them. *See* Defs.' Opp'n 32-33. Plaintiffs' own supplemental exhibits confirm this. *See* Pls.' Opp'n Supp. Ex. 1, Attach. A, at 5 (Nebraska) ("Based on [HHS] instructions . . . *no impact* will occur to the rebates currently accruing to the state budget.") (emphasis added).

Moreover, plaintiffs continue to mischaracterize the Act's maintenance-of-effort provisions, repeatedly asserting that they prevent states from reducing *any* optional Medicaid spending. Pls.' Opp'n 29, 31, 32, 41. In fact, as defendants have explained, *see* Defs.' Opp'n 28-29, while those provisions preclude a state from tightening its *eligibility* standards, they do *not* prevent states from adjusting optional covered benefits, copayments, provider payment rates, and many other features of their programs — and thus leave states with significant discretion to control costs. Thus, while plaintiffs correctly observe that 60 percent of Medicaid spending in 2001 was considered optional, they neglect to note that *fully half* of that optional spending was for optional *services*, *see* Pls.' Opp'n Supp. Ex. 7, which are unaffected by the ACA's maintenance-of-effort requirement.[14]

A proper accounting shows that the ACA's revenue-raising and cost-saving provisions more than offset any increase in state Medicaid outlays under the Act. Plaintiffs' estimates to the contrary are incomplete, inaccurate, and — as plaintiffs now concede — irrelevant to the constitutionality of the Medicaid amendments.

### B. Plaintiffs' Coercion Claim Is Not Fit for Judicial Resolution

In any event, plaintiffs' coercion claim is not justiciable because the theory cannot "be applied with fitness to the relations between state and nation." *Steward Machine Co. v. Davis*,

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[14] Moreover, beginning in 2011, many states will largely be exempt from the maintenance-of-effort provisions: for states with budget deficits, those provisions will not apply with respect to individuals above 133 percent of the federal poverty who are not pregnant or disabled. ACA § 2001(b).

301 U.S. 548, 590 (1937). As several courts have held, the coercion theory provides no judicially administrable standards, and essentially raises political questions that fall outside the province of the judiciary.

Plaintiffs first suggest that the Court decided this question when it found, at the motion to dismiss stage, that plaintiffs had stated a "plausible" claim for relief, and argue that the Court need not revisit that conclusion. Pls.' Opp'n 42. That is mistaken. Defendants moved to dismiss plaintiffs' coercion claim under Rule 12(b)(6) for failure to state a claim. *See* Defs.' Mot. to Dism. 1 [Doc. No. 55]; slip op. at 51. That motion did not challenge the justiciability of plaintiffs' coercion claim — a distinct challenge that goes to the Court's jurisdiction, and thus falls under Rule 12(b)(1). *See, e.g.*, *Carmichael v. Kellogg, Brown & Root Serv.*, 572 F.3d 1271, 1280 (11th Cir. 2009) (federal courts lack subject matter jurisdiction over political questions). And although the Supreme Court in *Steward Machine* expressly "assume[d]" that a coercion claim was justiciable in order to *reject* it on the merits, 301 U.S. at 590, this Court could not rule *for* plaintiffs on the merits of their coercion claim based on the same jurisdictional assumption.

Moreover, at the summary judgment stage, rather than merely accepting plaintiffs' allegations as true, the Court applies a different legal standard to a different evidentiary record. Here, defendants have adduced evidence — which is largely uncontroverted — about the interconnected political judgments that bear on the justiciability of plaintiffs' coercion claim as they have framed it: the significant variation in federal Medicaid spending from state to state; the differences in the nature and scope of state Medicaid programs; and the various ways that states choose to raise revenue — including through taxes — to fund their respective investments in

public services. Defs.' SJ Mem. 45-47.[15] It remains plaintiffs' burden at each stage of the case to demonstrate that their coercion claim presents a justiciable controversy over which the Court has jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Court should undertake this inquiry in view of the more developed record.

Plaintiffs concede that "the nature and scope of Medicaid programs and funding differ according to States' policies, sizes, and priorities." Pls.' Opp'n 43. And they do not dispute that, by any measure, federal Medicaid grants vary dramatically from state to state. In dollar terms, those grants ranged from $246 million (Wyoming) to $23.8 billion (New York) in fiscal year 2008 — a nearly 100-fold difference. Pls.' Resp. to Defs.' Stmt. of Facts ¶ 62. And as a percentage of state revenues, they ranged from 4.4 percent (Alaska) to 21.5 percent (Missouri). *Id.* ¶ 65. Plaintiffs insist, however, that these state-to-state differences do not matter, and focus instead on generalities about the Medicaid program as a whole and the size of the *average* federal Medicaid grant. But if the concept of "coercion" can be applied at all, it must be in a fact-specific context, for "[e]ven a rough assessment of the degree of temptation would require extensive and complex factual inquiries on a state-by-state basis." *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981); *cf. Steward Machine*, 301 U.S. at 590 (coercion is "a question of degree, at times, perhaps, of fact").

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[15] Plaintiffs fail to place defendants' evidence into dispute by asserting that it "speaks for itself" or that they "lack knowledge or information sufficient to admit or deny" it. *See, e.g.*, Pls.' Resp. to Defs.' Stmt. of Facts ¶¶ 61-67, 69-74 [Doc. No. 136]. At summary judgment, a nonmoving party cannot rest on such general denials, but instead must point to specific facts showing a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Accordingly, these statements of fact should be "deemed to be admitted." N.D. Fla. Loc. R. 56.1(A).

In any event, plaintiffs get even these general statistics wrong. They mistakenly, and repeatedly, assert that *federal* Medicaid funding constitutes, on average, 20 percent of state budgets. *See* Pls.' Opp'n 43 ("[F]ederal support for the Medicaid programs in all States is quite substantial, . . . averaging more than *20 percent* of total State spending nationally."); *id.* at 28 (a "withdrawal from Medicaid would mean the loss of funding . . . averaging 20 percent of States' budgets"). In fact, that figure includes both federal *and state* dollars spent on Medicaid. The *federal* portion actually constitutes, on average, about *11.5 percent* of total state expenditures. *See* Nat'l Ass'n of State Budget Officers, *Fiscal Year 2008 State Expenditure Report*, at 6 tbl.1 & 47 tbl.28 (Fall 2009) (Defs.' Ex. 40) [hereinafter NASBO Report]. Plaintiffs make the same mistake with respect to Alaska and Pennsylvania, suggesting that *federal* Medicaid grants constitute 8.4 percent and 30 percent, respectively, of those states' total budgets. Again, those figures include both federal *and state* dollars spent on Medicaid. In fact, *federal* Medicaid funding constitutes about 4.4 percent of Alaska's budget, *see* Pls.' Resp. to Defs.' Stmt. of Facts ¶ 65, and about 16.3 percent of Pennsylvania's, *see* NASBO Report at 6 tbl.1 & 47 tbl.28.

Plaintiffs also argue that these state-to-state variations are irrelevant because the size of federal Medicaid grants makes them coercive for *all* states, even where those grants compose only a small portion of state budgets. *See* Pls.' Opp'n 44 (coercion standard met "[r]egardless of which State is considered"); *id.* at 43 (standard met at either end of spectrum "and for all States in-between"). Still, they offer the Court no principled way to determine the "point at which pressure turns into compulsion." *Steward Machine*, 301 U.S. at 590.

Take Alaska, for example, whose $467 million federal Medicaid grant constitutes 4.4 percent of the state budget in fiscal year 2008. Plaintiffs would have the Court deem this amount coercive because it is the "largest" federal grant to Alaska. Pls.' Opp'n 44. Or because it is "not

a marginal" grant. *Id.* Or because it is a "significant percentage" of state funding. *Id.* at 43. But at what point does a grant morph from "marginal" to "significant"? When it comprises one percent of a state's budget? Two percent? Four? By comparison, in fiscal year 2008, Alaska also received $746 million in federal funds from the Department of Transportation, including $399 million from the Highway Trust Fund alone. *See* U.S. Census Bureau, *Federal Aid to States for Fiscal Year 2008*, at 17 tbl.1 (July 2009), *available at* http://www.census.gov/prod/2009pubs/fas-08.pdf. And it received $152 million in federal funds from the Department of Education. *Id.* at 5 tbl.1. Were those grants also coercive? Does it matter that Alaska has chosen not to impose a personal income tax or a sales tax on its citizens and, instead, raises the bulk of its revenue through severance taxes on oil and gas companies operating within its borders? *See* U.S. Census Bureau, *State Government Tax Collections in 2009*, at 3, 5 (May 2010), *available at* http://www2.census.gov/govs/statetax/2009stcreport.pdf.

At bottom, plaintiffs offer no judicially administrable standards to apply to these many questions. Instead, they assert that the Court need not draw the line separating pressure from coercion because, wherever its location, it is simply "apparent" that it has been crossed here, for any and all states. Pls.' Opp'n 44. On the contrary, any attempt to apply the coercion theory must proceed on a state-by-state basis, *see Oklahoma*, 655 F.2d at 414, and would necessarily turn on states' varying choices about how much to invest in public services, and how to raise revenue, including taxes, to fund those investments — decisions that each state's citizens, acting through their elected representatives, are always free to change. *See Nevada v. Skinner*, 884 F.2d 445, 448 n.5 (9th Cir. 1989). These are tough choices, no doubt, but undeniably political ones that fall outside the competence of the courts to second-guess. *See, e.g.*, *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 184 (1942) ("[W]hether a tax is wise or expedient is the business of the

political branches of government, not ours."). The Court should find plaintiffs' coercion claim nonjusticiable.

### C. Even If this Claim Is Justiciable, the ACA's Medicaid Provisions Are Not Coercive

As defendants have established, no court has *ever* invalidated *any* conditional spending program as coercive, by any measure:

- no matter how large the federal grant at stake;
- no matter what proportion of the state program the federal grant supports;
- no matter what proportion of the state's total budget the federal grant represents;
- no matter the importance of the federal grant to critical state services, including health care.

*See* Defs.' SJ Mem. 47-49 (chronicling cases). Plaintiffs do not dispute this. Plaintiffs also do not even acknowledge — let alone grapple with the reasoning of — the cases from the First, Second, Fourth, Eighth, Ninth, Tenth, and D.C. Circuits uniformly rejecting coercion challenges to conditions imposed on the receipt of federal funds. And while they suggest that this case is different because of the "unprecedented funding levels at stake," Pls.' Opp'n 45, they studiously ignore that entire Medicaid grants were also at stake in several of those cases — making them utterly indistinguishable. *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981).

To save their coercion claim, plaintiffs discuss just three cases: *Dole*, *College Savings*, and *Steward Machine*. None aids their cause. Although it is true that *Dole* referred to the withholding of 5 percent of federal highway funds as "relatively mild encouragement," *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (cited in Pls.' Opp'n 44), that "passage does not get

[plaintiffs] far," *Kansas v. United States*, 214 F.3d 1196, 1201 (10th Cir. 2000). "It is merely an instance in which the Court acknowledged circumstances *not* sufficient to constitute coercion." *Id.* And while in *College Savings*, the dissent made the rhetorical point that, depending on the circumstances, the withholding of a federal grant might be viewed as "more compelling and oppressive" than an implied waiver of sovereign immunity, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 697 (1999) (Breyer, J., dissenting) (cited in Pls.' Opp'n 44, 47), that passage cannot reasonably be read to mean that Justice Breyer thought that federal education or highway grants were unconstitutionally coercive. In fact, he never so much as mentioned coercion, *Dole*, or *Steward Machine*. *See id.* at 696-97. In any event, as defendants have already explained, *College Savings* is not even a Spending Clause case and, under Eleventh Circuit precedent, it is therefore inapposite. *See* Defs.' Opp'n 35-36 n.22 (citing *Benning v. Georgia*, 391 F.3d 1299, 1308 (11th Cir. 2004)).

Plaintiffs' attempt to marshal *Steward Machine* in support of their coercion claim fails entirely. *See* Pls.' Opp'n 34, 42. That case soundly refutes plaintiffs' argument that it matters for Spending Clause purposes that, if a state withdraws from Medicaid, "federal funds taken from [its] citizens via taxation that used to flow back into the states from Washington, D.C., would instead be diverted to the states that have agreed to continue participating in the program." Slip op. at 56 (cited in Pls.' Opp'n 28 n.19, 46). There, in rejecting a coercion claim where states that declined to create unemployment insurance funds stood to lose up to a 90 percent share of federal unemployment taxes — totaling hundreds of millions of dollars — the Supreme Court explicitly noted that "[i]f some of the states hold out in their unwillingness to pass statutes of their own, the receipts" collected by the federal government and not returned to the states "will be still larger." *Steward Machine*, 301 U.S. at 586 n.8.

Moreover, plaintiffs' attempt to distinguish *Steward Machine* is unpersuasive. That the statute at issue there involved a "wholly new" program rather than amendments to an existing one, Pls.' Opp'n 45, simply makes no difference. Either way, the states are put to a new choice, and either way, federal funding rides on the decision. And it is no distinction at all to say that, in *Steward Machine*, Congress offered "encouragement to States to administer an unemployment compensation program," while here, declining to participate in Medicaid would have "direct and drastic consequences for State budgets." *Id.* Such benefits and consequences are two sides of the same coin. Both here and in *Steward Machine*, Congress offered states a financial incentive (federal funding) to encourage them to administer a public program (unemployment insurance or Medicaid) in accordance with federal standards.

In the end, when considering a federal spending program, states are "ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." *Kansas*, 214 F.3d at 1203. That freedom is not rendered illusory by the size of the grant or its importance to state finances. *Oklahoma*, 655 F.2d at 414. If the law were otherwise, virtually any new condition attached to the Medicaid program — or any other large federal spending program — would be inherently coercive, and the more funding Congress chose to offer the states, the less control it would have over how that money was spent.

### D. The ACA's Medicaid Amendments Satisfy the "General Restrictions" on the Spending Power

Plaintiffs also attempt to fault defendants' motion for summary judgment for "fail[ing] to address" the Medicaid amendments' compliance with the four "general restrictions" on the spending power outlined in *Dole*. *See* Pls.' Opp'n 30, 48. But defendants established in their motion to dismiss that the Medicaid amendments satisfy each of those factors, *see* Mem. in

Supp. of Defs.' Mot. to Dism. 12-13 [Doc. No. 56-1], a point that both defendants and the Court noted that plaintiffs did not dispute. *See* Reply in Supp. of Defs.' Mot. to Dism. 2 [Doc. No. 74]; slip op. at 52 ("The plaintiffs do not appear to dispute that the Act meets these restrictions.").

In any event, the *Dole* arguments in plaintiffs' opposition brief duplicate those made in their motion for summary judgment. *Compare* Pls. Opp'n 48 [Doc. No. 135] *with* Pls.' SJ Mem. 44-45 [Doc. No. 80-1]. For a complete response to those arguments, defendants respectfully refer the Court to their opposition to plaintiffs' motion for summary judgment. *See* Defs.' Opp'n 36-38 [Doc. No. 137].

**CONCLUSION**

For the foregoing reasons, defendants' motion for summary judgment should be granted, and judgment should be entered in favor of defendants on Counts One and Four of the Amended Complaint.

Dated: December 6, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

THOMAS F. KIRWIN
United States Attorney

SHEILA LIEBER
Deputy Director

*/s/ Eric Beckenhauer*
BRIAN KENNEDY
Senior Trial Counsel, D.C. Bar No. 228726
ERIC B. BECKENHAUER, Cal. Bar No. 237526
Trial Attorney
U.S. Department of Justice

Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Telephone: (202) 514-3338
Facsimile: (202) 616-8470
E-mail: eric.beckenhauer@usdoj.gov

*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 6, 2010, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on Plaintiffs' counsel of record.

/s/ *Eric B. Beckenhauer*
ERIC B. BECKENHAUER